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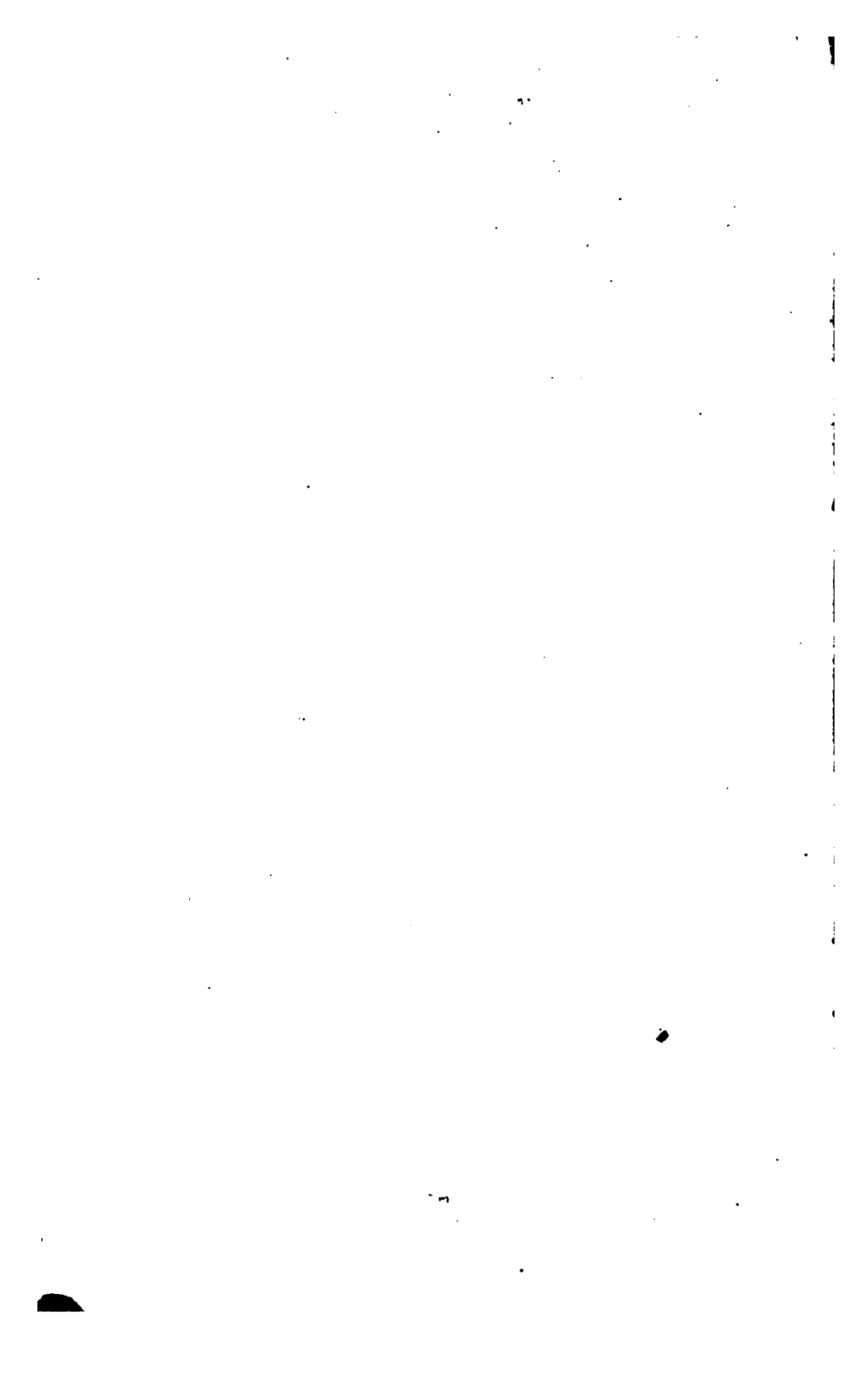
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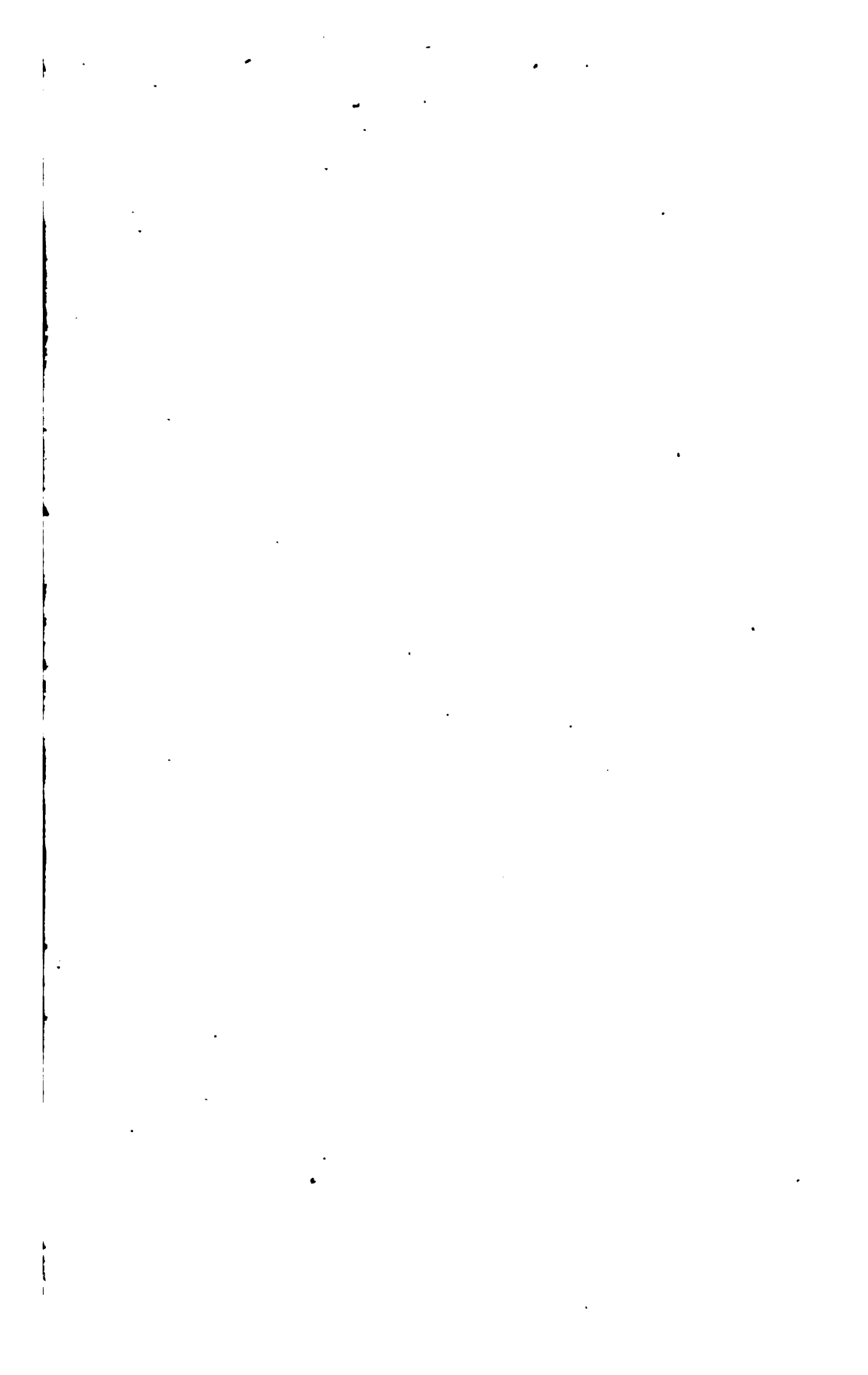


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OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By JOHN W. KERN,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. GEORGE V. HOWK.*†

HON. BYRON K. ELLIOTT.†§

HON. ALLEN ZOLLARS.†

HON. JOSEPH A. S. MITCHELL.‡

HON. WILLIAM E. NIBLACK.†

* Chief Justice at the May Term, 1886.

† Term of office commenced January 1st, 1883.

‡ Chief Justice at the November Term, 1886.

§ Term of office commenced January 3d, 1881.

‡ Term of office commenced January 6th, 1885.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SUCCEEDED BY
WILLIAM T. NOBLE.

SHERIFF,
MYRON NORTH.

LIBRARIAN,
CHARLES E. COX.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1886, IN THE SEVENTIETH
YEAR OF THE STATE.

No. 12,256.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY
COMPANY *v.* STUPAK.

MASTER AND SERVANT.—*Railroad.*—*Personal Injury.*—*Negligence of Fellow Servant.*—*Knowledge of Negligent Habits.*—*Complaint Against Master.*—A complaint by a servant against a master, to recover for an injury caused by the negligence of a fellow servant, to be good on demurrer for want of facts, must not only allege that the master knew that the fellow servant was negligent in the discharge of his duties, but it must also show that the plaintiff had no knowledge of that fact when he entered the master's service, and the failure to make the latter allegation is not cured by an averment that the plaintiff was "wholly unacquainted" with the fellow servant when he took the employment.

SAME.—*Remaining in Master's Service with Knowledge of Fellow Servant's Negligence.*—Where a servant remains in the master's service after he knows, or from circumstances ought to have known, of the negligent habits of a fellow servant, it is necessary, in a complaint by him against the master to recover for an injury caused by the negligence of the fellow servant, to show a reasonable excuse for remaining in the service after such knowledge.

From the Porter Circuit Court.

108	1
124	380
134	428
127	54
108	1
130	184
130	350
108	1
132	343
132	446
133	242
108	1
134	159
134	226
134	468
136	402
108	1
138	499
139	606
108	1
146	488
108	1
161	683
162	63
162	97
108	1
169	676

The Lake Shore and Michigan Southern Railway Company v. Stupak.

J. I. Best, A. Pond, O. G. Getzen-Danner, J. Morris, C. H. Aldrich and J. M. Barrett, for appellant.

A. D. Bartholomew, E. D. Crumpacker, A. C. Harris and W. H. Calkins, for appellee.

Howe, C. J.—The first error of which complaint is here made by appellant, the defendant below, is the overruling of its demurrer to the first paragraph of appellee's complaint.

In this first paragraph, appellee alleged that appellant was a railroad corporation owning and operating a railroad over and across Porter county, Indiana; that, in the operation of its railroad, appellant ran a certain locomotive engine and construction train, composed of flat cars, used for hauling gravel, etc., westward from Laporte, Indiana; that such locomotive and train of cars had been so used by appellant for five years before the commencement of this suit; that, on such train of cars, appellant had in its employ a large number of hands who resided at different points along its railroad, and were conveyed by such train to and from their places of labor, night and morning; that appellant had in its employ, for a year prior to the 13th day of August, as engineer of the locomotive engine used to propel such construction train, one — Pool who was habitually careless and negligent in the discharge of his duties as such engineer, during all of said time, and was not possessed of sufficient skill to run said engine in an ordinarily careful and prudent manner, of all which appellant had due notice but negligently retained said Pool in its employ as such engineer.

Appellee further alleged that some time during July, 1883, he being wholly unacquainted with said Pool, and with appellant's employees in charge of such construction train, entered the service of appellant as one of its laborers or work-hands upon such construction train, and as a track repairer of its road-bed; that on or about such 13th day of August, 1883, the appellee, while in appellant's employ, upon such construction train, was standing upon one of the cars of such train,

The Lake Shore and Michigan Southern Railway Company v. Stupak.

while the same was standing still, and while the locomotive engine attached thereto was in the management and control of said Pool, when, without any fault or negligence upon appellee's part, said Pool negligently and without any signal or warning suddenly put said engine and train of cars in rapid motion, whereby appellee was thrown off his feet, between two cars, and his arms were crushed and broken in such a manner as to be permanently disabled, and his person was otherwise mangled, cut and bruised, causing him great physical and mental suffering, etc.; to his damage, etc. All of which was wholly without his fault, but owing to the fault and negligence of said Pool as aforesaid, and of the appellant in keeping said Pool in its employ, as such engineer, after notice of his unskillful and negligent habits in running said engine as aforesaid. Wherefore, etc.

It is claimed by appellant's counsel that this paragraph of complaint was insufficient, and the demurrer thereto ought to have been sustained, for two reasons, namely:

1. Because appellee has not averred therein that he did not know of Pool's negligent habits at the time he entered appellant's service.

2. Because appellee has failed to aver any excuse for his remaining in appellant's service after he knew, or should have known, of Pool's negligent habits.

The general rule of law, recognized and acted upon in many of our decisions, is, that the master is not liable in damages to an employee for an injury caused or occasioned by the negligence, whether of omission or commission, of a co-employee or fellow servant. The liability to injury, resulting from the negligence of his co-employees, is one of the risks which each employee, engaging with others in the service of a common master, takes upon himself. Such a liability to injury is a hazard incident to the nature of the service into which the employee enters, and against which the master is not an insurer, in the absence of an express contract to that effect. Nor is the master rendered liable by the

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fact, if it be the fact, that the injured employee is inferior in grade of employment to the co-employee, through whose negligence the injury is caused, if both were employed in the same general business; or, in other words, "if the services of each in his particular sphere or department are directed to the accomplishment of the same general end." *Columbus, etc., R. W. Co. v. Arnold*, 31 Ind. 174. *Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294 (10 Am R. 111); *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151.

Where, therefore, as here, the servant shows in his complaint that the injury, for which he sues the master, was caused or occasioned by the negligence of his fellow servant, he must also allege in his complaint, either that the master had not exercised ordinary care and prudence in the employment of such fellow servant, or that it had retained him in its service, after it had received notice that he was negligent in the discharge of the duties of his position. This much must be stated, in relation to the negligence of the master; and with respect to himself, in such a case, the injured servant must aver in his complaint that, at the time he entered the master's service, he had no knowledge of the negligent habits of the fellow servant, through whose negligence he has alleged that he was injured. It is for the want of this last averment, or its equivalent, that the first paragraph of appellee's complaint in the case at bar was fatally insufficient. If the appellee knew, at the time he entered appellant's service (and we can not presume that he did not know, in the absence of any averment to that effect), that his fellow servant, Pool, was habitually negligent in the discharge of his duties as an engineer, and was not possessed of sufficient skill to run an engine in an ordinarily prudent manner, it must be held, we think, that he voluntarily took upon himself all the risks incident to, or growing out of, Pool's negligence and lack of skill in the management of his engine. Appellee has sued the appellant to recover damages for an injury, alleged by

The Lake Shore and Michigan Southern Railway Company v. Stupak.

him to have been caused by the negligence of Pool, his fellow servant. To have stated a cause of action, sufficient to withstand a demurrer for the want of facts, in such a case, it was necessary that the appellee should have alleged in his complaint, not alone that appellant knew of Pool's negligence, but also that he had no knowledge thereof; for, if he had knowledge of Pool's negligent habits, and entered appellant's service with such knowledge, he thereby consented to serve with Pool in the way and manner in which Pool conducted appellant's business; and having so consented, he can have no sufficient grounds of complaint against appellant for an injury, caused by or resulting from Pool's negligent habits. *Sullivan v. India Man'y Co.*, 113 Mass. 396; *Gibson v. Erie R. W. Co.*, 63 N. Y. 449 (20 Am. R. 552); *De Forest v. Jewett*, 88 N. Y. 264; *Wonder v. Baltimore, etc., R. R. Co.*, 32 Md. 411 (3 Am. R. 143); *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212; *Hughes v. Winona, etc., R. R. Co.*, 27 Minn. 137; *Riest v. City of Goshen*, 42 Ind. 339; *Green, etc., Passenger R. W. Co. v. Bresmer*, 97 Pa. St. 103; *McGinnis v. Canada Southern Bridge Co.*, 8 Am. & Eng. R. R. Cases, 135, note p. 139; *Wood Mast. & Serv.*, section 423, note.

The appellee alleged in the first paragraph of his complaint, on the point under consideration, that he was "wholly unacquainted with said Pool." This averment by no means supplies or meets the objection, urged by appellant's counsel, to the sufficiency of the first paragraph of appellee's complaint. The fact that appellee was wholly unacquainted with Pool does not show, nor tend to show, that he was not fully informed of Pool's negligent habits and lack of skill as an engineer at the time he entered appellant's service as Pool's fellow servant. We are of opinion, therefore, that appellant's first objection to the sufficiency of the first paragraph of appellee's complaint is well taken and must be sustained.

Appellant's counsel also insist in argument that the first paragraph of complaint was bad on the demurrer thereto,

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because appellee failed to allege therein any excuse for his remaining in appellant's service after he knew, or should have known, of Pool's negligent habits. Appellee alleged that "some time during July, 1883," he entered appellant's service as a laborer and track repairer, and continued in such service until the 13th day of August, 1883, on which day he was injured. As against the appellee, this averment may be fairly construed to mean that on the 1st day of July, 1883, he entered appellant's service, etc., and continued in such service for the six weeks thence next ensuing until the day on which he was injured. During all of such six weeks he worked on the construction train, whereof Pool was the engineer in charge and conveyed appellee by such train to and from his place of labor, night and morning. If, as alleged, "Pool was habitually careless and negligent in the discharge of his duties as such engineer, during all of said time, and was not possessed of sufficient skill to run said engine in an ordinarily careful and prudent manner," it can not be doubted that appellee knew, or ought to have known, of Pool's negligent habits long before the day on which he was injured. Of such a case, in *Wood on Master and Servant*, section 422, it is said: "So, too, when a co-servant is injured through the incompetency of a fellow servant, and he knows or has the same means of knowing of such incompetency as the master has, he can not recover for injuries resulting to him from such servant's negligent acts, because he is chargeable with negligence in not informing the master, if he knew the fact, or if he did not, is equally as chargeable with negligence as the master, for not knowing it; and if he did know of it, and with such knowledge remained in the service, he is treated as assuming all the risks incident to such incompetency or unskilfulness, unless he establishes a reasonable excuse for remaining." The text of the learned author is fully supported by the decided cases, cited in the foot-notes. *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 105 (4 Am. R. 364); *Stafford v. Chicago, etc., R. R. Co.*, 114 Ill. 244; *Dillon v.*

Rice v. City of Evansville.

Union Pacific R. R. Co., 3 Dillon U. S. C. C. 319; *Leary v. Boston, etc., R. R. Co.*, 139 Mass. 580 (52 Am. R. 733); *Hughes v. Winona, etc., R. R. Co.*, *supra*.

In the case in hand, appellee has not alleged, nor attempted to allege, any excuse whatever for his remaining in appellant's service after he knew, or ought to have known, of Pool's negligent habits. We think, therefore, that appellant's second objection to the sufficiency of the first paragraph of appellee's complaint herein is also well taken, and ought to have been sustained.

For the reasons given we are of opinion that the trial court clearly erred in overruling appellant's demurrer to the first paragraph of appellee's complaint herein. This conclusion requires a reversal of the judgment below, and, therefore, renders it unnecessary for us to consider or decide now any of the questions discussed by counsel, arising under the alleged error of the court in overruling the motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the first paragraph of complaint, and for further proceedings not inconsistent with this opinion.

MITCHELL, J., took no part in the decision of this cause.

Filed Oct. 12, 1886.

No. 11,688.

RICE v. CITY OF EVANSVILLE.

MUNICIPAL CORPORATION.—Sewers.—Insufficient Capacity.—Negligence.—Injury by Overflows.—Liability.—Where there is no negligence in devising the plan of a sewer or in constructing it, a municipal corporation is not liable for an injury to private property resulting from overflows caused by the insufficient capacity of the sewer, unless its inadequacy is such as in itself to constitute negligence.

108	7
124	316
126	81

108	7
120	112

108	7
131	266
132	236

108	7
126	72

106	7
138	616

108	7
144	607

108	7
149	498
149	672

108	7
158	635

108	7
160	166

108	7
168	211

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SAME.—Grading Street.—Consequential Injuries.—A municipal corporation is not liable for consequential injuries resulting from the grading of streets in a careful and skillful manner; but it is liable if it undertakes to collect the water in one channel and is negligent in devising the plan, performing the work, or providing an outlet where one is made necessary by its own act.

SAME. — Natural Watercourse, What is.—Ravines through which surface water occasionally flows are not natural watercourses within the meaning of the law. To constitute a natural watercourse there must be a bed and banks and evidences of a permanent stream of running water.

SPECIAL FINDING.—What Necessary to Authorize Judgment Upon Notwithstanding General Verdict.—Burden of Proof.—Where there is a general verdict against the party having the burden of the issue, he is not entitled to a judgment on the special findings, unless all the facts essential to a recovery by him appear in the answers of the jury and are irreconcilable with the verdict.

From the Vanderburgh Superior Court.

J. E. Williamson, for appellant.

J. B. Rucker, for appellee.

ELLIOTT, J.—The appellant seeks a recovery against the city of Evansville for injuries to his property caused by overflows, which he charges resulted from the wrongful and the negligent acts of municipal authorities. The general verdict was for the appellee, and with it the jury returned answers to interrogatories submitted to them.

It is found by the jury, in answer to special interrogatories, that there was no negligence in devising the plan of the sewers or in constructing them, and as it is to these sewers that the appellant attributes his injury, he can not recover solely upon the ground that the sewers were of insufficient capacity. A municipal corporation is responsible for negligence in devising the plan of a sewer, as well as for negligence in carrying the plan into execution, but it is not responsible for mere errors of judgment. If the inadequacy in the size of a sewer is owing to the omission to exercise ordinary skill and care in planning and performing the work, the municipal corporation is liable, but if the inadequacy of the sewer is attributable to a mere error of judgment, there

Rice v. City of Evansville.

is no liability. *City of North Vernon v. Voegler*, 103 Ind. 314; *City of Crawfordsville v. Bond*, 96 Ind. 236; *City of Evansville v. Decker*, 84 Ind. 325 (43 Am. R. 86); *Cummins v. City of Seymour*, 79 Ind. 491 (41 Am. R. 618); *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135); *City of Indianapolis v. Huffer*, 30 Ind. 235.

The controlling question in cases where the municipal corporation is sought to be made liable for injuries from overflows is: Was there negligence on the part of the municipal corporation in devising the plan of the sewer or in carrying it into execution? For if there was no negligence there is no liability, although an error of judgment may have caused the corporate authorities to provide a plan for a sewer of inadequate capacity. There may possibly be cases where the court could say, as a matter of law, that the inadequacy of the sewer was such as in itself to constitute negligence, but, however this may be, it is very clear that with the general verdict and the special answers of the jury against the appellant, the court can not declare that the city was guilty of negligence in this instance.

It is contended that the facts found by the jury show that the city wrongfully obstructed a natural watercourse by constructing a culvert of insufficient size, and that where a natural watercourse is obstructed the corporation is liable for resulting injuries, although it may not have been guilty of negligence. Upon the strength of this argument the appellant claims that he is entitled to a judgment on the special findings, but we can not uphold this claim, for, if it were granted that there was a natural watercourse, and that a culvert was constructed of insufficient size, still there can be no recovery, because all the facts essential to a recovery are not found, and because the answers are not absolutely irreconcilable with the general verdict. It is found that there was no negligence, and that the culvert is of less capacity than the watercourse was, but how much less is not found. The record thus exhibits the finding: Question. "How much

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less capacity has the sewer than the watercourse?" Answer. "Don't know; there was no evidence on that point." In the face of the general verdict, and in view of the fact that the burden of proof was on the appellant, it can not be asserted that his case is made out, for it may well be that the capacity of the sewer was so little different from that of the natural watercourse as not to perceptibly obstruct the flow of water. As against the general verdict, it can not be presumed that there was a material obstruction of the watercourse. Nor does it appear from the answers that the culvert caused the overflows; for anything that appears, the overflows may have occurred more often before than after the construction of the culvert. Nor does it appear that the incapacity of the culvert was the proximate cause of the overflow of appellant's property, and it is well settled that it must appear that the wrong of the defendant was the proximate cause of the injury which is alleged as the cause of action. *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, 99 Ind. 486.

It is the rule that a special verdict must state all the facts essential to a recovery, and that nothing can be supplied by intendment. *Dixon v. Duke*, 85 Ind. 434; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Redelsheimer v. Miller*, 107 Ind. 485.

It is also the settled rule, that if facts are not found in a special finding they will be presumed, as against the party who has the burden of proof, not to have been proved. *Mitchell v. Colglazier*, 106 Ind. 464; *Krug v. Davis*, 101 Ind. 75.

If these are the rules where there is no general verdict, much stronger is the reason for the rule which obtains in cases where there is a general verdict adverse to the party who asks a judgment on the special finding of the jury. Where there is a general verdict against the appellant, certainly neither presumption nor intendment in his favor can be made for the purpose of awarding him a judgment. *Bal-*

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timore, etc.; *R. R. Co. v. Rowan*, 104 Ind. 88. The facts found by the jury in this case, even if there were no general verdict against appellant, would not warrant a judgment in his favor on the ground assumed in the argument we are here discussing, and with the general verdict confronting him, it is legally impossible for him to succeed. The plaintiff, who has the burden of proof in a case where a general verdict is against him, is in a much worse situation than his adversary, for all the facts essential to a recovery must appear in the answers of the jury, and they must be irreconcilable with the general verdict; while in the case of the defendant, all that need appear is enough to defeat the plaintiff's case, and make a reconciliation between the general verdict and the answers of the jury impossible.

It is also contended by counsel with much earnestness and ability, that, taking all the facts found by the jury into consideration, the court can declare, as matter of law, that the city was guilty of negligence; but, with the general verdict, and some of the answers of the jury adverse to the appellant, this can not possibly be done. Where a plaintiff asks a judgment on the special findings, notwithstanding the general verdict, he will fail unless all the findings are favorable to him, for, if some are favorable and some unfavorable, he can not escape the force of the general verdict. *Redelsheimer v. Miller*, *supra*; *Davis v. Reamer*, 105 Ind. 318; *Hereth v. Hereth*, 100 Ind. 35, and cases cited; *Indiana Car Co. v. Parker*, 100 Ind. 181, see p. 198.

Applying these settled principles to the case before us, it is quite clear that judgment can not be awarded the appellant on the answers to interrogatories on the ground that they show negligence on the part of the city.

It has long been the law of this State, that for consequential injuries resulting from the grading of streets in a careful and skilful manner, the municipal corporation is not liable. *Macy v. City of Indianapolis*, 17 Ind. 267; *Weis v. City of*

Rice v. City of Evansville.

Madison, supra; *City of Kokomo v. Mahan*, 100 Ind. 242, and cases cited p. 244.

So far, then, as any injury resulted from the grading of the streets, no claim can be successfully urged against the city, although it may have greatly increased the flow of surface water along the property of the appellant.

While it is the law that a city is not responsible for consequential injuries resulting from the careful and skilful grading of its streets, still, it is liable if it undertakes to collect the water in one channel, and is negligent in devising the plan, performing the work, or providing an outlet where one is made necessary by its own act. A municipal corporation is not, however, bound to undertake the work of providing sewerage or drainage, but if it does enter upon the work, it is liable for negligence in devising the plan and in doing the work. *Weis v. City of Madison, supra*, and cases cited; *City of Logansport v. Wright*, 25 Ind. 512.

In this case there is evidence supporting the appellant's theory that there was negligence in devising the plan of the sewer as well as in doing the work, but there is also evidence to the contrary, and we must accept that as credible on which the jury acted. *Binford v. Adams*, 104 Ind. 41; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Gathright v. Burke*, 101 Ind. 590; *Julian v. Western Union Tel. Co.*, 98 Ind. 327; *Cain v. Goda*, 94 Ind. 555; *Arnold v. Wilt*, 86 Ind. 367.

Accepting as trustworthy the evidence which influenced the jury, we must hold that there was no negligence.

We can not agree with counsel that the evidence shows without conflict that the city wrongfully collected the water in one channel and poured it upon the appellant's property, for on this point there is a material conflict. We agree with counsel as to the legal proposition that a city is liable if it undertakes to collect water in one channel, and wrongfully pours it upon another's land. *Lipes v. Hand*, 104 Ind. 503; *City of Evansville v. Decker*, 84 Ind. 325 (43 Am. R. 86);

Bice v. City of Evansville.

Weis v. City of Madison, supra; *Cairo, etc., Co. v. Stephens*, 73 Ind. 278, 283 (38 Am. R. 139); *Templeton v. Voshloe*, 72 Ind. 134, and cases cited (37 Am. R. 150).

While we agree with counsel as to the legal proposition, we think the case is not within the rule, for the reason that the evidence fairly shows that the city attempted to convey the water past the property of the appellant, but was not guilty of negligence, although the officers of the city may have erred in judgment as to the size of the sewer or culvert. In this state of the evidence we must respect the verdict of the jury upon this point.

We can not concur in counsel's view that the evidence shows without conflict that the city undertook to build a culvert across a natural watercourse. We need not decide whether there is, or is not, an absolute liability irrespective of the question of negligence, in cases where a municipal corporation undertakes to build a sewer, and it is therefore unnecessary for us to comment upon the cases of *Perry v. City of Worcester*, 6 Gray, 544, *Earl v. De Hart*, 1 Beasley, 280, *Palmer v. Waddell*, 22 Kan. 352, and other like cases referred to by the appellant. There is some evidence tending to prove that there was a natural watercourse, but there is evidence to the contrary, and we can not attempt to reconcile the conflict.

Ravines through which surface water occasionally flows are not natural watercourses within the meaning of the law. "To constitute a natural watercourse, there must be a bed and banks and evidences of a permanent stream of running water." *Weis v. City of Madison, supra*. *Hoyt v. City of Hudson*, 27 Wis. 656 (9 Am. R. 473); *Howard v. Ingersoll*, 13 How. 381, 427.

We do not think the evidence in this case so clearly shows that there was a natural watercourse as to make it our duty to reverse on the evidence.

Judgment affirmed.

Filed Oct. 16, 1886.

Huff v. The City of Lafayette.

No. 12,579.

HUFF v. THE CITY OF LAFAYETTE.

CITY.—Annexation of Unplatted Lands.—Petition of Council to County Commissioners.—Sufficiency when Signed by Mayor Only.—Collateral Attack.—Where the petition to the board of county commissioners for the annexation of unplatted land to a city, upon its face, appears to be the petition of the mayor and common council, but is signed by the mayor only, it is sufficient under section 3196, R. S. 1881, at least as against a collateral attack, after the board has acted upon it as the petition of the council.

SAME.—Contiguity.—Consent of Land-Owner.—Presumption.—Where it is proposed to annex several tracts of land, under section 3196, all need not be contiguous to the city, but it is sufficient if they are contiguous to each other and one is contiguous to the city; and in a collateral attack upon the annexation proceedings, it will be presumed that the lands annexed were contiguous and unplatted, and that the owners would not consent to the annexation, unless the contrary is shown.

SAME.—Petition.—It is not necessary that the petition for annexation should state that the land-owners will not consent to an annexation by the common council of the city.

SAME.—Notice.—Notice of the presentation of the petition to the county commissioners is not insufficient because signed by the mayor only, and because it does not contain the name of one of the land-owners and particularly describe his land.

SAME.—Where there is notice in the manner provided by the statute, it is sufficient as against a collateral attack.

PLEADING.—Exhibit.—An exhibit which is not the foundation of a pleading can not be looked to in aid thereof.

PRACTICE.—Remedies.—Appeal.—Collateral Attack.—Informalities and irregularities must be corrected by appeal. They can not be taken advantage of in a collateral attack.

From the Tippecanoe Circuit Court.

S. A. Huff, for appellant.

W. C. L. Taylor, for appellee.

ZOLLARS, J.—Appellant instituted this action against the city of Lafayette to recover taxes paid to it, and to enjoin the collection of taxes which it was threatening to collect.

A demurrer was sustained below to each of the two paragraphs of the complaint. We limit our examination to the second paragraph, as it is conceded, in argument, that a de-

108 14

126 436

108 14

188 462

108 14

142 507

108 14

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108 14

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170 185

108 14

171 13

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cision as to its sufficiency will dispose of all material questions presented by this appeal.

To generalize somewhat, it appears from the averments of this paragraph, that appellant's lands, specifically described, are farm lands, and can be used for no other purpose; that the city, since 1875, has claimed the right to tax them for city purposes, and has based and still bases that claim upon the further claim that those lands were annexed to the city by the board of commissioners of Tippecanoe county, in 1868. Appellant assails the proceedings of the county board which led to the order of annexation, and avers that those proceedings and the final order of annexation are void for want of jurisdiction.

It is averred, in substance, that the board did not have jurisdiction either of the subject-matter, or of the person, so far as he is concerned. Amongst other contentions, it is insisted in the first place, that the petition upon which the county board acted was not sufficient to give that body jurisdiction.

Three objections to the petition are urged. The first is, that it was a petition by the mayor of the city, and not by the common council, as required by section 3196, R. S. 1881. The petition to the county board, and the subsequent proceedings upon which they based the final order of annexation, are copied into the complaint, and thus made a part of it. The petition is signed "John Pettit, Mayor." Upon its face, however, it appears to be a petition by the mayor and common council. The petition starts thus: "To the board of commissioners of Tippecanoe county, Indiana: The mayor and common council of the city of Lafayette would respectfully petition," etc. In another portion of the petition is this: "And the council would respectfully urge the annexation," etc.

The statute, section 3196, R. S. 1881, which is substantially, if not in all respects, the same as the law in force when the proceeding was had before the county board, provides,

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that if the city desires the annexation of unplatted lands, the common council shall present a petition to the county board asking for such annexation. The petition must be presented by the common council, and not by the common councilmen individually. And while it was held in the case of *Stilz v. City of Indianapolis*, 55 Ind. 515, that the petition signed by the councilmen was sufficient in the case before the court, it was not held, and has not been held in any case by this court, that the signatures of the councilmen to the petition are necessary. In that case, it will be observed, that the petition was authorized by the common council, acting as a common council, and doubtless, if it had not been so authorized, it would have had no validity whatever. Upon an analogous question, see *City of Indianapolis v. Bly*, 39 Ind. 373. The petition must be by the common council—must be an act of the common council when in session, representing the city. The statute does not provide by whom it shall be signed, or that it shall be signed by any one. We know of no reason why the petition, with authority from the common council, may not be signed, and presented to the county board, by the mayor of the city. There is nothing in the complaint in any way charging that the common council, acting as a common council, did not order the petition drawn just as it was, and to be signed by the mayor as it was.

It is shown that through the entire proceeding to the end, the county board treated the petition as the petition of the common council. In this collateral attack upon the proceedings of the board, and under the averments in the complaint, it must be presumed that the petition was the petition of the common council, and that before proceeding upon it, the board ascertained and determined that fact. That was a fact to be determined by the board before proceeding.

The second and third alleged fatal defects in the petition are, that it was not alleged therein that appellant's lands were adjoining the city, and were not laid off and platted; and,

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further, that it was not alleged therein that appellant would not consent to the annexation of his lands.

The statute, section 3196, *supra*, provides that any land, contiguous to the city, may be annexed by the consent of the owner and by a two-thirds vote of the common council. It further provides that contiguous unplatted territory, to the annexation of which the owner will not consent, may be annexed by the county board upon the petition of the common council, etc.

It was not necessary that appellant's lands should have been contiguous to the city. If his, and the other tracts of land proposed to be annexed, were contiguous to each other, and one of them was contiguous to the city, that was sufficient. *Catterlin v. City of Frankfort*, 87 Ind. 45.

The petition clearly shows that some of the lands proposed to be annexed were contiguous to the city. It is also shown that a plat of the lands proposed to be annexed was filed with, and as a part of, the petition. That plat is not set out in the complaint, nor is there any allegation that it did not show the exact location and description of the lands proposed to be annexed, including appellant's lands.

For aught that is made to appear, that plat may show that appellant's lands were unplatted lands, and contiguous to the city. In a collateral assault upon the proceedings, it should be presumed that it did, and that it showed that those lands were contiguous to other lands which were contiguous to the city.

If, as contended, in order that the county board might annex the lands, it should have been made to appear that the owners would not consent to their annexation by the common council, it should be presumed in this collateral attack upon the proceedings, that the board made proper investigation, and correctly determined that the land-owners would not so consent. If that inquiry is material in such a proceeding, it

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must be made by the board regardless of any statement that may be contained in the petition upon the subject.

The complaint here, supported by the petition incorporated therein, shows that the petition asked for the annexation of tracts of land other than those owned by appellant. It is not averred that any of the other land-owners would consent to the annexation of their lands, and hence it is not shown that their lands might have been annexed by the common council without resort to the county board; nor is it alleged that appellant had consented, or would consent, to the annexation of his lands by the common council. And if he alone had consented, that fact would not necessarily have ousted the jurisdiction of the board, conceding that the board can not proceed in such a case, except where the land-owners will not consent to the annexation of their lands. For aught that is made to appear here, appellant's lands may not have been contiguous to the city, but may have been surrounded by the other lands. In such a case, the common council could not annex his lands, although he might give his consent, because of their not being contiguous to the city. And, upon his theory, they could not be annexed by the county board, because he had not refused his consent to their then annexation by the common council. Such a theory would necessitate two separate proceedings, one by the county board to annex the other lands, and thus bring appellant's lands in contiguity with the city, and another and subsequent proceeding by the common council to annex his lands. And if subsequently to the annexation by the county board, appellant should change his mind, and withdraw his consent, a second proceeding by the county board would be necessitated in order to annex his unplatted lands. Appellant's theory, as applied to this case, we think, leads to unreasonable results, and is not supported by a proper construction of the statute. *Catterlin v. City of Frankfort, supra*. Nor do we think that it is essential that the petition should contain a statement that the land-owners have not consented to an annexation by the common council.

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Such a statement is not one of the things which the statute in affirmative terms requires shall be stated in the petition.

An analogous case is that of a highway proceeding, where it is required that the petition shall be signed by twelve freeholders of the county, six of whom shall reside in the immediate vicinity of the proposed highway; and where it has been held, that the petition is not fatally defective because it does not contain a statement of the petitioners' qualifications. *Washington Ice Co. v. Lay*, 103 Ind. 48; *Brown v. McCord*, 20 Ind. 270; see, also, *Kellogg v. Price*, 42 Ind. 360 (362); *Swinney v. Fort Wayne, etc., R. R. Co.*, 59 Ind. 205; *Argo v. Barthand*, 80 Ind. 63.

The complaint states that a notice of the presentation of the petition to the county board was given, but that it was insufficient because signed by the mayor, as was the petition, and because it did not contain appellant's name, and did not particularly describe his lands.

As to the signature by the mayor, we need add nothing to what has been said in disposing of that question in connection with the petition, except to cite again the case of *Catterlin v. City of Frankfort*, *supra*, where the question is discussed and decided as we here decide it.

Upon the other objections to the notice, it may be said in passing, that an examination of the notice would have afforded appellant information of the fact that his lands were included in the territory proposed to be annexed to the city. But we are not called upon to decide as to whether or not the notice would have been sufficient had its sufficiency been questioned at the proper time before the county board. It is sufficient here, that there was a notice in the manner provided by the statute, and that its sufficiency is questioned for the first time in a collateral attack upon the proceedings. As against such an attack, the notice is sufficient. *City of Terre Haute v. Beach*, 96 Ind. 143, and cases there cited; *McMullen v. State*,

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ex rel., 105 Ind. 334, and cases there cited; *Pickering v. State, etc.*, 106 Ind. 228; *City of Logansport v. LaRose*, 99 Ind. 117, and cases there cited.

It is further averred and contended, that the final order of annexation made by the county board, an attested copy of which was filed with and recorded by the county recorder, is insufficient. That final order was not copied into the complaint as a part of it, nor are its contents stated therein, but a copy was filed with the complaint as an exhibit, as though it were a written instrument upon which the pleading is founded, as provided in the code. Section 362, R. S. 1881. The copy so filed is in no sense the copy of a written instrument within the meaning of the above section of the code, and hence did not become a part of the complaint by being filed as an exhibit, and can not be looked to in aid of, or as supplying averments in, the complaint. *City of Logansport v. LaRose, supra*. The complaint is thus left without any averment showing any infirmity in the final order of the county board. We may say, however, that we have examined the final order, as contained in the exhibit, and considered carefully the argument of appellant's counsel in relation thereto, and find no such infirmity in the order as would justify a court, in this collateral attack, commenced thirteen years after the order was made, in overthrowing the annexation.

The proceedings, in many respects, are not as exact and formal as they ought to be, but they are not so informal and lacking in essentials as to be void upon the face of the record. Informalities and irregularities are to be corrected in a direct proceeding by appeal, and can not be taken advantage of in a collateral attack. To the cases above cited, we add the case of *Young v. Sellers*, 106 Ind. 101, and cases there cited.

After a patient examination of the several questions discussed by counsel, we are constrained to hold that the court

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below did not err in sustaining the demurrer to each paragraph of appellant's complaint.

Judgment affirmed, with costs.

Filed Oct. 15, 1886.

No. 12,762.

WATSON v. PENN.

REAL ESTATE.—Lease by Testator.—Life-Estate Taken Subject to.—When Rents go to Reversioner and not to Life Tenant's Administrator.—Where one takes by devise a life-estate in land, subject to an existing lease which was made by the testator, and dies during the term of the lessee, before any rent becomes due, no part of the rent for the term is payable to his administrator, but the same goes to the reversioner.

SAME.—Bequest of Personal Property.—Accounts.—A bequest of all the testator's personal property, including notes and accounts, does not entitle the administrator of the life tenant to receive rents which become due after the death of his decedent.

SAME.—Definition of Account.—The term *account* has no clearly defined legal meaning, but its primary idea is some matter of debt, or a demand in the nature of a debt, arising out of contract, and does not include rents until they have accrued.

SAME.—Time of Payment of Rents.—Usage.—Where there is no time stipulated for the payment of rent for land which is leased for the term of one year, and no such usage as that an agreement to the contrary may be implied, payment is to be made at the end of the year.

From the Montgomery Circuit Court.

T. H. Ristine and H. H. Ristine, for appellant.

A. D. Thomas, for appellee.

MITCHELL, J.—John F. Penn, as guardian of Margaret Penn, brought this suit to recover from William W. Watson certain rent money collected by the latter as executor of the last will of James G. Watson, deceased, which the guardian claimed on behalf of his ward.

The questions involved arise on the pleadings, which present the following facts: James G. Watson died on the 17th

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day of September, 1882, testate. Prior to his death the testator leased 160 acres of land, owned by him, to one Hunt for the term of one year, to commence March 1st, 1883, the rental agreed upon being \$275. It does not appear that the time for the payment of rent was agreed upon, or that there was such a usage in that respect as would make it fall due otherwise than as the law would imply.

By his will the testator devised the land leased to his widow, Ann E. Watson, for her life, with remainder over to his granddaughter, Margaret Penn, the appellee's ward.

Another clause of the will gave the widow, Ann E. Watson, all the personal property, including all notes and accounts owned by and owing to the testator at the time of his death.

Ann E. Watson, the testator's widow, died intestate, June 19th, 1883, without having received any part of the rent in question. The appellant, as executor of the last will of James G. Watson, received the rent, and refused to pay it over to the guardian of Margaret Penn, claiming that under the will it properly belonged to the estate of Ann E. Watson, deceased.

Upon the facts stated, the court below was of the opinion that the appellee was entitled to recover the whole amount received by the appellant for rent. Judgment was given accordingly. The only inquiry here is as to the propriety of this holding.

Mrs. Watson having taken her life-estate subject to an existing lease, which was made in the lifetime of the testator, and having died during the term of the lessee, before any rent became due, the first question is, was any or all of the rent for the term payable to her personal representative?

It is a settled rule of law, which the appellant does not question, that rents of real estate which have accrued and become payable before the death of an intestate, go to the personal representative, while those which mature and fall due afterwards go to the heir. *King v. Anderson*, 20 Ind.

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385; *Evans v. Hardy*, 76 Ind. 527; *McDowell v. Hendrix*, 67 Ind. 513; *Dorsett v. Gray*, 98 Ind. 273. Rents that have accrued are rents which are due.

By the common law, the right to receive accruing rent, which would have been payable to a life tenant, who took his estate subject to a prior lease for a term, passes to the reversioner in case of the death of such tenant before rent day. In such a case, wherever the reversion goes, whether to the original lessor, or his grantees or descendants, the accruing rent, from the rent day next antecedent to the death of the life tenant, follows without apportionment. If the estate of the life tenant terminates intermediate rent days, or before any rent has become due, the accruing rent becomes an incident of, and is annexed to, the estate of the reversioner. Whoever owns the reversion when the rent falls due is entitled to receive the whole sum, unless it is otherwise provided by contract. *Taylor Landlord & Tenant*, sections 154-156; *Marshall v. Moseley*, 21 N. Y. 280; *Perry v. Aldrich*, 13 N. H. 343 (38 Am. Dec. 493); *Wilcoxon v. Donnelly*, 90 N. C. 245; *Porter v. Sweeney*, 61 Texas, 213; *Stevenson v. Hancock*, 72 Mo. 612; *Westmoreland v. Foster*, 60 Ala. 448.

An exception to this rule occurs when the lessor receives a note, or other obligation, independent of the lease, to secure the payment of rent. Some of the authorities hold that by this means the obligation to pay rent is separated from the estate, and does not follow the reversion.

Rent in arrears is no part of the reversion. In any case such rents are recoverable by the personal representative of the life tenant. But rent is not in arrears and does not become a debt until the day when by the terms of the lease it becomes payable. *Wood v. Partridge*, 11 Mass. 488; *Randall v. Rich*, 11 Mass. 494; *Wood Landlord and Tenant*, section 452.

If there be no time stipulated for the payment of rent, or no such usage as that an agreement to the contrary may be implied, payment is to be made at the end of the year,

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rent being in its nature a return for the enjoyment of the annual profits of the land. *Elmer v. Sand Creek Tp.*, 38 Ind. 56; *Wood v. Partridge*, *supra*; Taylor Landlord and Tenant, section 391.

It may be remarked, that at the common law, in case a life tenant who had no power to make a lease to continue beyond the period of his life, leased the estate and died between rent days, the under tenant or lessee escaped the payment of rent entirely from the last rent day. The lessee was not bound to pay the personal representative of his lessor because he suffered a technical eviction on account of the termination of his lessor's estate before the end of the term, or before the rent fell due. The reversioner could not recover, because the estate was not devolved upon him until the termination of the lease, and he was not in privity either of estate or by contract with the lessor. The death of the life tenant terminated the lease, as well as the estate of the lessor. If the lessee continued in possession, he became thenceforth liable to the reversioner under a new contract, but he was absolved from the payment of all rent which had not matured when the estate of his original lessor was determined.

The statute of 11 George II., c. 19, sec. 15, after reciting the defects in the law, provided, among other things, that in case the death of a life tenant, who had leased the estate, happened before the day fixed for the payment of rent, his executor or administrator might recover a proportion of the rent according to the time the lessor lived during the last rent period. Substantially to the same effect is section 5223, R. S. 1881.

This statute has, however, manifestly no application to the case before us. It provides, in substance, that when a tenant for life, who shall have demised any lands, shall die before the day when any rent becomes due, his executor or administrator may recover from the under tenant the rent which accrued before the life tenant's death.

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As we have already seen, the lease or demise under which the rent in controversy accrued, was not made by the life tenant. She took her estate subject to the existing lease. The will which created her life-estate gave the reversion to the appellee's ward, and as the reversion came from the lessor, under whose lease the rent in controversy accrued, it came with the right annexed to collect all accruing rent, as an incident to the estate.

As there was no necessity for a statute in cases where the accruing rent followed the reversion, the common law rule prevails.

It is said, however, because the testator's will provided that his widow should take all his personal property, including all notes and accounts which might be owing him at his death, that by force of this bequest the accruing rents were carried out of the rules above referred to, and thus became the property of the widow.

As it does not appear either from any alleged usage or from the terms of the agreement, that any part of the rent had matured or become payable at the death of the testator, or even at the death of the widow, it is not perceived how the position contended for can be maintained.

The testator died after the lease was made but before the term commenced. It is impossible, therefore, in any view of the case, to consider the rent which subsequently accrued, as an account owing to the testator at the date of his death, so as to be controlled by the will. Accruing rents are, however, not affected by or included in the general term "accounts." While the term "account" has no very clearly defined legal meaning, the primary idea conveyed by it is some matter of debt, or a demand in the nature of a debt, arising out of contract. *Nelson v. Board, etc.*, 105 Ind. 287.

Rents accruing from, and issuing out of, real estate, are in the nature of chattels real, and can not be assimilated to, or accurately described as accounts, until they have accrued or

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become due. Until then they are annexed to the real estate and an incident of the reversion. Bouvier Dict., title "Rent."

The judgment is affirmed, with costs.

Filed Oct. 14, 1886.

108 96
126 200

No. 12,552.

WASSON v. HODSHIRE.

PRINCIPAL AND SURETY.—*Negligence of Creditor in Collection of Debt.*—*Release of Surety.*—Any affirmative act of the creditor, such as the release or fraudulent surrender of a collateral security, whereby an indemnity of which the surety might avail himself is lost to him, discharges the surety *pro tanto*; but mere passive negligence of the creditor in the collection of his debt, either from the principal debtor or from collateral securities held by him, does not discharge the surety.

PRACTICE.—*Striking Out Evidence.*—*Harmless Error.*—Where a party is not injured by the striking out of evidence, the ruling, even if erroneous, is not available for the reversal of a judgment.

From the Montgomery Circuit Court.

E. C. Snyder and R. J. Greene, for appellant.

P. S. Kennedy, S. C. Kennedy, T. H. Ristine and H. H. Ristine, for appellee.

NIBLACK, J.—This was a proceeding by James Wasson against Martha Hodshire to have a judgment declared satisfied, and to have satisfaction of such judgment accordingly entered.

The circuit court made a special finding of the facts, adjudged to have been satisfactorily proven, which may be briefly stated, as follows:

First. That, on the 7th day of May, 1872, the plaintiff and one John Wasson were the joint owners of a particularly described tract of land in Montgomery county; estimated to contain one hundred and sixty acres.

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Second. That, on that day, the plaintiff and the said John Wasson borrowed of the defendant the sum of \$2,250, and executed to her their promissory note for that sum, to secure the payment of which a mortgage was also executed by them on the tract of land above referred to.

Third. That one-half of said sum of \$2,250 was received by the plaintiff, and was for his use and benefit, and that the remaining half of said sum was received by the said John Wasson, and was for his use and benefit.

Fourth. That as to the one-half of said sum of \$2,250 so received by the said John Wasson, the plaintiff was only surety for him, the said John Wasson, which fact became known to the defendant on the 20th day of May, 1876.

Fifth. That, on the 7th day of April, 1875, the plaintiff paid to the defendant one-half of the amount then due upon the note executed by him and the said John Wasson as above stated, the sum so paid being the amount for which the plaintiff was liable as principal on said note.

Sixth. That, on said 7th day of April, 1875, the defendant released all the interest of the plaintiff in and to the tract of land mortgaged to her as above set forth, from the lien of the mortgage.

Seventh. That, on the 13th day of April, 1876, the defendant commenced a suit in the Montgomery Circuit Court against the plaintiff and the said John Wasson for the balance due on the note executed by them and to foreclose the mortgage given to secure the payment thereof, which suit, on the 20th day of May, 1876, resulted in a judgment against the plaintiff and the said John Wasson for the sum of \$1,484.40, including attorney's fees, and a decree of foreclosure of the mortgage as to the interest of the said John Wasson in the mortgaged lands, being one undivided half thereof.

Eighth. That, on the 3d day of November, 1876, a copy of said judgment and decree was duly certified to the sheriff of Montgomery county, who afterwards advertised the in-

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terest in the mortgaged lands ordered to be sold, for sale on the 21st day of April, 1877.

Ninth. That, at the time of the rendition of said judgment and decree, the said John Wasson had become a bankrupt, and Mahlon D. Manson was his assignee in bankruptcy and had succeeded to all his rights in the mortgaged lands.

Tenth. That by certain proceedings in partition in the Montgomery Circuit Court, the interest which John Wasson held in the mortgaged lands, at the time he became a bankrupt, was assigned and set off to the said Manson as his assignee in severalty, and the interest which the plaintiff held in said lands was also assigned and set off in severalty to him.

Eleventh. That the part of the lands thus set apart to Manson as assignee was subject to the lien of the defendant's mortgage, and that said part of said lands was suffered to, and did, become delinquent for the non-payment of taxes, and was afterwards, on the 14th day of February, 1879, at a sale for delinquent taxes, sold to one Hector S. Braden.

Twelfth. That thereafter, on the 14th day of February, 1881, the said Hector S. Braden, having acquired a tax deed for the part of the mortgaged lands so purchased by him at a sale for delinquent taxes, commenced an action in the Montgomery Circuit Court against the defendant herein and others, to quiet his title to the real estate described in his tax deed, and obtained a judgment against the defendant hereto quieting his title to such real estate; that the defendant failed to appear to said action, and suffered judgment therein to go against her by default, thereby permitting herself to be deprived of the benefit of her lien on the mortgaged lands, under her mortgage, as a security for the payment of her judgment against the plaintiff and the said John Wasson.

Upon this finding of facts the circuit court came to the following conclusions:

First. That as the loss of mortgage security was not occasioned by any affirmative act of the defendant, but was the result of a mere failure on her part to pay the delinquent

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taxes on the land, she was not guilty of such negligence in respect to the loss of the mortgage security as released and discharged the plaintiff as surety in the judgment upon the mortgage debt.

Second. That the defendant was entitled to judgment in her favor upon the facts found as above.

The plaintiff reserved exceptions to the conclusions of law thus arrived at by the circuit court, and, a motion for a new trial thereafter entered being denied, final judgment was rendered in favor of the defendant.

Error is assigned upon the conclusions of law, stated as above, and upon the refusal of the circuit court to grant a new trial.

In addition to the facts, as they were substantially found at the trial, the complaint averred that, at a sheriff's sale, the defendant had bid off the mortgaged lands at a price sufficient to cover the principal, interest and costs due upon the judgment upon the mortgage debt, but that she had failed to pay the costs which had accrued on such judgment and sheriff's sale, and had otherwise refused to complete her purchase thus made of the mortgaged lands.

In support of his complaint the plaintiff read in evidence the judgment upon the mortgage debt and the decree of foreclosure against him and John Wasson, together with a certified copy of such judgment and decree, which had been issued to the sheriff of Montgomery county. He also read in evidence two receipts endorsed upon said certified copy; one from the sheriff acknowledging the receipt of \$1,620.70 from the defendant in full, her bid and purchase-money on the lands therein described, and the other from the defendant acknowledging the receipt of \$1,566.60 from the sheriff, in full of principal and interest due on the judgment referred to in such certified copy. But no return by the sheriff to the certified copy of the judgment and decree, showing a sale of the lands to the defendant and a refusal by her to complete her purchase, was read in evidence. Nor was any evidence either

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introduced or offered which supplied the place of such a return, and the fair inference from the evidence offered was that the sheriff made no formal return to such certified copy. The circuit court, after hearing all the evidence, ordered the two receipts which had been introduced as stated to be struck out, and refused to consider them as evidence in the cause.

It is first argued that the facts as found at the trial established a degree of negligence and bad faith on the part of the defendant sufficient to entitle the plaintiff to a discharge from all further liability on the judgment upon the mortgage debt, and that consequently the circuit court erred in its conclusions of law drawn from the facts so found at the trial.

It is often difficult, when considered as an original and independent question, and with reference alone to the principles of equity and fair dealing, to determine upon whom, as between a creditor and a surety, the loss of a collateral security ought to fall; but, when considered with reference to the adjudicated cases, the question is divested of much of the difficulty which would otherwise attend its proper application.

It is now well settled that an affirmative act of the creditor, such as the release or fraudulent surrender of a collateral security, whereby an indemnity, of which the surety might avail himself, is put out of his reach, discharges the surety *pro tanto*; but that the mere passiveness of the creditor in the collection of his debt, either from the principal debtor or from collateral securities held by him, does not afford a sufficient ground for discharging the surety. *Philbrooks v. McEwen*, 29 Ind. 347; *Vance v. English*, 78 Ind. 80.

By way of further illustration, it has been said as applicable to cases similar in principle to the one in hearing, that so long as the surety chooses to remain passive, the creditor may also remain passive as regards the collection of his debt. *Philbrooks v. McEwen*, *supra*.

In this case, the plaintiff Wasson might have paid the judgment and been subrogated to all the rights of the defendant in the mortgaged lands, but, failing in that, he has no reason

The State, *ex rel.* Andrew, *v.* Webber *et al.*

to complain of the mere passive negligence of the defendant in permitting a loss of her mortgage lien. The circuit court did not, consequently, err in its conclusions of law from the facts as it found them upon the evidence.

It is further argued that the circuit court erred in striking out the two receipts read in evidence, and in refusing to consider them as evidence in the cause, and that for that reason a new trial ought to have been granted. There was no averment in the complaint concerning these receipts, and they were, hence, not relied upon as evidence that the judgment on the mortgage debt had been paid. They only tended to prove that the defendant herein had purchased the mortgaged lands at sheriff's sale, but they did not of themselves establish the fact that she had so purchased these lands, and as the evidence was not otherwise sufficient to establish that fact, no material injury was inflicted upon the plaintiff by striking out those receipts as evidence in the cause.

The judgment is affirmed, with costs.

Filed Oct. 12, 1886.

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129	32
108	31
167	31

No. 12,753.

THE STATE, EX REL. ANDREW, *v.* WEBBER ET AL.

SCHOOLS.—Regulation of Studies.—Discretionary Power of School Authorities.—Suspension of Pupil.—Mandamus to Compel Readmission.—A rule, prescribed by the superintendent of the free graded schools of a city, with the sanction of the trustees, that the pupils in the high school department shall at stated intervals employ a certain period of time in the study and practice of music, for which purpose they shall provide themselves with a prescribed book, is an exercise of discretionary power conferred by law, and unless the regulation is shown to be unreasonable, or a satisfactory excuse for failing to comply therewith is given, mandamus will not lie to compel the school authorities to readmit a pupil who has been suspended for disobedience thereof.

From the Laporte Circuit Court.

J. H. Bradley and L. A. Cole, for appellant.

A. Anderson and M. Nye, for appellees.

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Howk, C. J.—On the 19th day of November, 1885, the appellant's relator, Abram P. Andrew, filed his verified complaint or affidavit herein, in the court below, wherein he stated that he was a native-born citizen of the United States and of this State, and was then, and for more than ten years last past had been, a *bona fide* resident householder, freeholder and taxpayer of the city of Laporte, Indiana, and that he then resided, and for more than five years last past had resided, in the third ward of such city; that the appellees Leroy D. Webber, Edward J. Church and Ellis Michael, were the acting board of school trustees of such city, and as such trustees were in charge of the public schools of such city; and that the appellee William N. Hailman was employed by such board as the superintendent of such public schools, and as such superintendent had, under the direction of such board of trustees, the general management, oversight and supervision of such public schools.

The relator further said, that he was the father and natural guardian of one Abram Andrew, who was a white male child, between the ages of six and twenty-one years, to wit, of the age of twelve years, was unmarried, resided with the relator in the third ward of such city, and had so resided with, and been subject to the control of, his father, the relator, ever since his birth; that said Abram Andrew was, in all respects, legally qualified and entitled to attend the public schools of such city as a pupil thereof, and to receive instruction therein; and that, for three years next preceding the grievances thereinafter stated, said Abram Andrew had, in pursuance of his rights and of the relator's rights and wishes, attended such public schools as a pupil therein, during all which time he had been an obedient and diligent pupil, and had faithfully complied with all the rules and regulations prescribed by such board of school trustees and superintendent for the government of such schools.

And the relator further said, that the public schools of such city were what were known as "Graded Schools," one

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grade thereof being known as the "High School;" that at the beginning of the school term of such schools, in the fall of 1885, the said Abram Andrew, being sufficiently advanced in his studies, in accordance with the relator's desire and consent, and in compliance with his legal rights in the premises, was admitted as a pupil in such high school to receive instruction therein, and thereafter until his suspension, as thereafter stated, was regular in his attendance and deportment, and was obedient and respectful to his teachers, and properly subordinate to the rules and regulations of such school; that among the exercises prescribed by such superintendent, with the sanction of such board of trustees, for the pupils of the high school, was a requirement that each of the pupils should, at stated intervals, employ a certain period of time in the study and practice of music, and that they should provide themselves with prescribed books for that purpose; that the relator, believing it was not for the best interest of said Abram Andrew and not in accordance with the relator's wishes regarding the instruction of his said son, in a respectful manner asked of such superintendent that Abram Andrew might be excused from the study and practice of music at such exercises, and directed Abram Andrew not to participate therein, all in good faith and in a respectful manner, and with no intention of, in any manner, interfering with the government, rules and regulations of such schools, except in so far as he might legally control and direct the education of his said son, which purpose and desire were fully communicated by him to such superintendent.

But the relator said that, notwithstanding his said desire and request so communicated to such superintendent as aforesaid, the superintendent on or about the 14th day of October, 1885, in disregard of the relator's wishes and request, required said Abram Andrew to participate in the practice and study of music, and upon the refusal of said Abram Andrew to participate in such exercises and study, which he

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did without disrespect to such superintendent and entirely because of the relator's direction, which was so communicated to such superintendent as aforesaid, the superintendent suspended said Abram Andrew from such school without assigning any cause therefor other than his refusal to participate in such musical exercises and studies, and, as the relator averred, without any legal cause or justification whatever; that such suspension was reported to, and approved by, such board of school trustees, and the said Abram Andrew, in consequence of such suspension, had been thence hitherto and still was debarred from attendance upon such high school, as a pupil thereof; that after the promulgation of such order of suspension, and before the filing of his verified complaint or affidavit herein, the relator demanded of such board of school trustees the revocation of such order of suspension, and that Abram Andrew be readmitted as a pupil of such high school, which demand such board and each member thereof refused to comply with, but admitted that no charges of misconduct or insubordination existed against Abram Andrew, excepting only his refusal to participate in such musical studies and exercises, in violation of the expressed wishes of the relator; and so the relator said, that his son Abram Andrew was deprived of his right to attend and receive instruction in such high school, without any reasonable or justifiable cause whatever. Wherefore, etc.

An alternative writ of mandate was issued by the court. The appellees appeared and jointly demurred to the relator's verified complaint or affidavit herein, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court. The relator excepted, and, failing to amend, judgment was rendered against him for appellees' costs.

The sustaining of the demurrer to his verified complaint is assigned here, as error, by appellant's relator.

We have given a full summary of the facts stated by the relator, in his verified complaint herein, almost in the language

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of the pleader. It will be seen therefrom that the superintendent of the free public schools of the city of Laporte, with the sanction of the trustees of the school city of Laporte, had made a rule or regulation for the government of the pupils of the high school, in the graded schools of such city, requiring that each of such pupils should, at stated intervals, employ a certain period of time in the study and practice of music, and should provide himself with a prescribed book for that purpose. The relator's son, Abram Andrew, was one of the pupils of such high school, and at the instigation, and by the direction, of his father, he disobeyed or violated such rule and regulation, and refused to employ any period of time in the study and practice of music, and to provide himself with the prescribed book, or books, for the purpose of the study and practice of music. For his disobedience of such rule or regulation, and his refusal to comply therewith, the pupil, Abram Andrew, was promptly suspended from the high school, and his suspension was approved by the trustees of the school city of Laporte. This action is brought by the father and natural guardian of the suspended pupil to compel, by mandate, the governing authorities of the school corporation to revoke such suspension, and to readmit such pupil to the high school.

The question for our decision in this case, as it seems to us, may be thus stated: Is the rule or regulation, for the government of the pupils of the high school of the school city of Laporte, in relation to the study and practice of music, a valid and reasonable exercise of the discretionary power conferred by law upon the governing authorities of such school corporation?

In section 4497, R. S. 1881, in force since August 16th, 1869, it is provided as follows: "The common schools of the State shall be taught in the English language; and the trustee shall provide to have taught in them orthography, reading, writing, arithmetic, geography, English grammar, physiology, history of the United States, and good behavior, and

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such other branches of learning and other languages as the advancement of pupils may require and the trustees from time to time direct."

Under this statutory provision, and others of similar purport and effect, to be found in our school laws, it was competent, we think, for the trustees of the school city of Laporte to enact necessary and reasonable rules for the government of the pupils of its high school, directing what branches of learning such pupils should pursue, and regulating the time to be given to any particular study, and prescribing what book or books should be used therein. Such trustees were and are required, by the express provisions of section 4444, R. S. 1881, in force since March 6th, 1865, to "take charge of the educational affairs" of such city of Laporte; "they may also establish graded schools, or such modifications of them as may be practicable; and provide for admitting into the higher departments of the graded school, from the primary schools of their townships, such pupils as are sufficiently advanced for such admission."

The power to establish graded schools carries with it, of course, the power to establish and enforce such reasonable rules as may seem necessary to the trustees in their discretion, for the government and discipline of such schools, and prescribing the course of instruction therein. Confining our opinion strictly to the case in hand, we will consider and decide these two questions, in the order of their statement, namely:

1. Has the appellant's relator shown, by the averments of his verified complaint, that the rule or regulation for the government of the pupils of the high school, in the school city of Laporte, of which he complains, was or is an unreasonable exercise of the discretionary power conferred by law upon the trustees of such school corporation and the superintendent of its schools?

2. Conceding or assuming such rule or regulation to be reasonable and valid, has the relator shown, in his complaint

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herein, any sufficient or satisfactory excuse for the non-compliance therewith, and the disobedience thereof, of his son Abram Andrew, a pupil of such high school, or any sufficient or legal ground for the revocation of the suspension of his son, or for his son's readmission as a pupil in such high school?

1. As to the first of these questions, it will be seen from the relator's verified complaint, the substance of which we have heretofore given, that he has not attempted to show, in any manner, that the rule or regulation requiring that each of the pupils of the high school, as one of the exercises prescribed by the superintendent, with the sanction of the trustees, for the pupils of such school, should, at stated intervals, employ a certain period of time in the study and practice of music, and, for that purpose, should provide himself with a prescribed book, was not a reasonable and valid exercise of the discretionary power conferred by law upon such trustees and superintendent. It can not be doubted, we think, that the Legislature has given the trustees of the public school corporations the discretionary power to direct, from time to time, what branches of learning, in addition to those specified in the statute, shall be taught in the public schools of their respective corporations. Where such trustees may have established a system of graded schools, or such modifications of them as may be practicable, within their respective corporations, they are clothed by law with the discretionary power to prescribe the course of instruction, in the different grades of their public schools. We are of opinion that the rule or regulation, of which the relator complains in the case under consideration, was within the discretionary power conferred by law upon the governing authorities of the school city of Laporte, that it was not an unreasonable rule, but that it was such an one as each pupil of the high school, in the absence of sufficient excuse, might lawfully be required to obey and comply with.

It will be observed that the relator has stated the require-

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ments of the rule, whereof he complains, with much vagueness and uncertainty. "Each of the pupils shall, at stated intervals," etc. What the intervals are, whether once a week, once a month, or once each term or session, is wholly left to conjecture. "Employ a certain period of time," etc. There is no period of time more uncertain in duration, than the time represented by the expression, "a certain period of time." Was it fifteen minutes, one hour, or one day? The relator has not informed us.

We pass to the consideration of the second question, above stated.

2. The school authorities of the city of Laporte, in the exercise of the discretionary power conferred on them by law, adopted a rule or regulation requiring that each pupil of their high school should, at stated intervals, employ a certain period of time in the study and practice of music and, for that purpose, should provide himself with a prescribed book. The relator requested the superintendent of the public schools of the city of Laporte to excuse his son, Abram Andrew, who was one of the pupils of the high school, from the study and practice of music at the musical exercises of such school, and directed his son not to participate in such musical exercises. The superintendent afterwards required the relator's son, as one of the pupils of the high school, to take part in the musical exercises of the school, and, upon his refusal to obey or comply with such requirement, suspended him from such high school. The only cause or reason assigned by the relator for requiring his son to disobey such rule or regulation was, that he did not believe it was for the best interest of his son to participate in the musical studies and exercises of the high school, and did not wish him to do so. The relator has assigned no cause or reason, and it may be fairly assumed that he had none, in support either of his belief or of his wish. The important question arises, which should govern the public high school of the city of Laporte, as to the branches of learning to be taught and the course of in-

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struction therein, the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator, without cause or reason in its support? We are of opinion that only one answer can or ought to be given to this question; the arbitrary wishes of the relator, in the premises, must yield and be subordinated to the governing authorities of the school city of Laporte, and their reasonable rules and regulations for the government of the pupils of its high school. This is the doctrine of the cases decided by the courts of last resort in many of our sister States; and, as applicable to the facts of this case, we think it is the better doctrine. *Roberts v. Boston*, 5 Cush. 198; *Hodgkins v. Rockport*, 105 Mass. 475; *Ferriter v. Tyler*, 48 Vt. 444 (21 Am. R. 133); *Sewell v. Board, etc.*, 29 Ohio St. 89; *Donahoe v. Richards*, 38 Maine, 379; *Gurnsey v. Pitkin*, 32 Vt. 224; *Kidder v. Chellis*, 59 N. H. 473.

On the other hand, it is not to be denied that the decisions of the Supreme Courts of Illinois and Wisconsin are in apparent conflict, to some extent at least, with what we here decide. *Morrow v. Wood*, 35 Wis. 59 (17 Am. R. 471); *Rulison v. Post*, 79 Ill. 567; *Trustees, etc., v. People*, 87 Ill. 303 (29 Am. R. 55). There is much in the opinions of those learned courts, which, applied to the cases before them, meets our approval; but we think that the doctrine of those cases can not apply, and ought not to be applied, to the case in hand as stated by the relator, in his verified complaint herein, to which case we limit this opinion.

For the reasons given, our conclusion is that no error was committed by the court below in sustaining appellees' demurrer to the relator's complaint.

The judgment is affirmed, with costs.

Filed Oct. 16, 1886.

Porter et al. v. Waltz et al.

No. 12,748.

PORTER ET AL. v. WALTZ ET AL.

108	40
139	278

108	40
152	376

PROMISSORY NOTE.—*Cross Complaint by Surety.*—*Exhibit.*—Where, in an action against the makers of a promissory note, one of the defendants files a cross complaint against his co-defendants, averring generally that he executed the note merely as surety for the other makers, the note is not the foundation of his action and need not be made an exhibit.

SAME.—*Relation of Makers to Each Other.*—*Form of Signing Note.*—*Evidence.*

—The form in which one of the makers of a promissory note signs the instrument, is only *prima facie* evidence of the relation which exists between him and the other makers.

SPECIAL FINDING.—*General Verdict.*—*Judgment Non Obstante.*—*Evidence.*—

Upon a motion for judgment on special findings, notwithstanding the general verdict, the findings, within the issues, import absolute verity, and unless they are irreconcilable with the general verdict, the motion must be overruled, without regard to the evidence.

INSTRUCTIONS TO JURY.—*Harmless Error.*—A judgment will not be reversed on account of an erroneous instruction, where it affirmatively appears that such instruction did not influence the verdict.

INTERROGATORIES TO JURY.—*Striking Out.*—*Harmless Error.*—It is a harmless error to refuse to strike out interrogatories to the jury, where the answers thereto are immaterial.

EVIDENCE.—*Conveyance.*—*Contract.*—*Consideration.*—*Conversation.*—*Res Gestæ.*—Where the consideration for a conveyance of land is in issue, and the contract is in parol and the grantor dead, the conversation of the parties, relative to the consideration, while conducting the negotiations resulting in the contract, is admissible as part of the *res gestæ*.

From the Switzerland Circuit Court.

J. D. Works, L. O. Schroeder and W. R. Johnston, for appellants.

W. D. Ward, T. Livings, J. B. McCrellis and G. S. Pleasants, for appellees.

MITCHELL, J.—William Waltz brought suit on a note, in which he was named as payee, calling for five hundred dollars, due one year after date, with eight per cent. interest. The note was signed, their names standing in the order below, by Patrick E. Porter, Timothy I. Porter, F. J. Sieben-thal, and J. C. Long, the latter adding after his name "security for the three above parties."

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It was averred in the complaint that Patrick E. Porter died before the bringing of the action, leaving no estate to be administered. No representative of his estate was made a party.

The defendants filed separate verified answers, in which each set up that he signed the note as surety, and that, after it had been signed, a material alteration had been made therein, by erasing therefrom the words "attorney's fees," under such circumstances as released him from liability.

Long also filed a cross complaint against Siebenthal and Timothy I. Porter, in which he alleged that he executed the note as surety for the other makers, and prayed judgment accordingly.

Siebenthal and Timothy I. Porter joined in a cross complaint against Long, in which they charged that the latter had assumed the payment of the debt evidenced by the note, in consideration of certain real estate conveyed to him by Patrick E. Porter, the principal debtor. They asked that Long might be adjudged primarily liable.

Upon issues made on the complaint and cross complaints, the cause was tried by a jury, who returned a general verdict, with answers to interrogatories, submitted by the respective parties.

Upon these a judgment was rendered against Siebenthal and Timothy I. Porter, as principals, and against Long as surety.

The first error assigned is that the cross complaint of James C. Long does not state facts sufficient. The infirmity relied on for a reversal is, that the cross complaint fails to set out a copy of the note upon which the cross complainant asks to be declared surety. It is argued, with some plausibility, that in a case where the writing itself is relied on to determine the question of suretyship, such writing becomes the foundation of the action.

The complaint under consideration does not, however, predicate the complainant's suretyship on the face of the paper,

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but avers generally that the cross complainant executed the note as the surety for the other makers, and in no other manner.

Moreover, it is well settled that as between the makers of a note, the form of the instrument is not conclusive as to their relations with each other. Suretyship is a fact collateral to the contract, and is ordinarily no part of the contract itself. *Carpenter v. King*, 9 Met. 511.

The rights and liabilities of sureties depend ultimately upon the relation which each sustained to the other and to the transaction, as well as upon the contract between themselves. The form in which Long signed the note was, therefore, only *prima facie* evidence of the relation which existed between him and the other makers. *Schooley v. Fletcher*, 45 Ind. 86; *Bowser v. Rendell*, 31 Ind. 128; *Lacy v. Lofton*, 26 Ind. 324; *Horn v. Bray*, 51 Ind. 555 (19 Am. R. 742); *Nesbit v. Knowlton*, 51 Ind. 352.

The case of *Landon v. White*, 101 Ind. 249, relied on by the appellant, does not rule the case under consideration. In the case cited the defendant set up as a defence to a promissory note, that the plaintiff had taken possession of certain personal property by virtue of a chattel mortgage, under such circumstances as that the taking possession of the property constituted in law a satisfaction of the debt. It was held in that case that the chattel mortgage was the foundation of the defence.

Since, however, in the case before us the cross complainant's rights depended upon the circumstances attending the transaction, or the agreement between the makers of the note, the note was not the foundation of his action. *Watts v. Fletcher*, 107 Ind. 391.

At the proper time the appellants moved the court for judgment in their favor, on the special findings of the jury, notwithstanding the general verdict. Because this motion was overruled, it is next insisted the judgment ought to be reversed.

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Each of the parties interested submitted a number of interrogatories to the jury. Without setting them out in detail, the following summary indicates all the material facts specially found, in answer thereto. Responsive to those submitted by the plaintiff, the jury returned: (1) That the note sued on was altered after it was signed by Timothy I. Porter, and (2) before it was signed by Siebenthal, and (3) Long, (4) and that the plaintiff had no knowledge of the alteration before he received the note, and delivered the consideration for which it was given; (5) that the money for which the note was given was paid by the plaintiff to Samuel Stacy on a debt owing to him by Patrick E. Porter, as principal, and for which the defendants were bound as sureties; (6) that Siebenthal, upon ascertaining that the note was altered, did not repudiate it, (7) that he signed it in consideration that Long also signed, and (8) that he knew of the alteration at the time he signed it, and before the delivery to the plaintiff.

To interrogatories propounded by Long, the jury returned: (1) That Long signed the note as surety for the other makers, and (2) that he signed it under the belief and with the understanding that the other defendants were bound thereon. They find (3) that the note was altered after it was signed by Timothy I. Porter, by (4) striking out the printed words "attorney's fees" and filling blanks, and (5) that this was done with his consent, and (6) in good faith. They further find (7) that Long purchased the land mentioned in Siebenthal and Timothy I. Porter's cross complaint in good faith, for a valuable consideration, (8) agreeing to pay therefor \$1,665.86, and (9) that he had paid \$1,728.86, paying, (10) in order to discharge liens thereon, \$163 more than he had agreed.

In answer to nineteen interrogatories propounded by Siebenthal and Porter, the jury returned, in substance (1, 2), that both Patrick and Timothy I. Porter signed the note at the house of the latter, (3) the note being at the time a blank printed form, (4. 5. 6. 7) with the words "attorney's fees"

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printed therein, these words being at the time of signing un-erased by any mark; (8) that these words were afterwards obliterated by a line, made with pen and ink, being drawn through them, and that this was done with the implied consent of Timothy I. Porter, (9) but that he had no notice of the erasure before the note was delivered to the plaintiff; (10) that Siebenthal signed the note after it had been signed by the Porters, and after it had been otherwise completely filled out, (11) at a grocery store in Vevay, Indiana, (12) and that he knew of the erasure of the words "attorney's fees" before it was delivered to the plaintiff, (13) by James C. Long, (14) who made the obliteration, (15) the latter having retained the custody of the note, from the time it was signed until it was delivered.

The jury find further (16, 17), that Siebenthal knew of the erasure before the commencement of the suit, but that Timothy I. Porter did not; that both signed as principals, and (19) that Long did not agree to pay the note in suit in consideration of certain real estate conveyed to him by Patrick E. Porter.

In addition to the general verdict which found against the appellants, it will be seen from the foregoing, that while the note was altered as claimed, the alteration was made by Long, before it was signed by Siebenthal, with the consent of Timothy I. Porter. This left the liability of the parties precisely as if no alteration had been made.

It is contended, however, that the findings which indicate that Timothy I. Porter consented to the alteration are without support in the evidence, and that hence the question must be considered as if no such facts had been found.

This view of the subject is wholly inadmissible. Upon a motion for judgment on special findings, notwithstanding the general verdict, the findings of the jury, within the issues, import absolute verity, and unless they are so irreconcilably in conflict with the general verdict as that both can not stand, the motion must be overruled, without regard to the evidence.

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Cox v. Ratcliffe, 105 Ind. 374; *Pennsylvania Co. v. Smith*, 98 Ind. 42; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88.

In this case the special findings and general verdict are in close accord. The motion was, therefore, properly overruled.

Was there error in overruling the motion for a new trial? This is the next question presented by appellants. At this point counsel expressly waive a discussion of whether or not the evidence was sufficient to sustain the findings and verdict of the jury; hence, in this connection, we give that subject no further consideration.

The giving of certain instructions is complained of. In these instructions the court undertook to define the rights and liabilities of the several parties, in the event the jury should find that a material alteration had been made, or certain blanks filled, in the note after it was signed, without the knowledge or consent of one or more of the makers. Since, however, we have already seen, that by the special finding of the jury, the case was set in a situation, as if no alteration in the note had occurred, the jury having found that the parties to be affected either had knowledge of the alteration when they signed, or consented that it might be made, it is of no consequence whether the rights of the parties, predicated upon a state of circumstances which was found not to exist, were defined with entire accuracy or not. In such a case, it affirmatively appears that the instructions, even though erroneous, were not influential in bringing about the result reached. A reversal, therefore, will not follow. *Woolery v. Louisville, etc., R. W. Co.*, 107 Ind. 381; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264, and cases cited.

Without stopping to examine them in detail, we may say, however, the instructions which are criticised, with others given, presented the law of the case to the jury fairly and accurately. There was evidence too which made them pertinent.

It may be conceded that some of the interrogatories propounded to the jury by the plaintiff were immaterial, and

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that the appellants' motion to strike them out might well have been sustained. The refusal of the court to strike out interrogatories, the answers to which may be immaterial, does not, however, present a case for reversal. At most this was but a harmless error.

Some of the interrogatories objected to, which were submitted on behalf of the defendant Long, were, however, not immaterial, as for example the fifth, which required the jury to answer whether or not Timothy I. Porter either expressly or impliedly consented to the alteration of the note. The answer to this question was a fact pertaining to the very essence of the issue. Whether or not the answer is sustained by sufficient evidence, does not affect the materiality of the question.

It is contended finally, that the court erred in admitting in evidence a certain conversation between the defendant Long and Patrick E. Porter, deceased, relative to the consideration for a conveyance of certain lands by the latter to Long. It is said, because the conversation took place in the absence of the appellants, it was in the nature of hearsay evidence, and therefore incompetent. It must be remembered that one of the questions in issue related to the consideration upon which a certain conveyance had been made by the principal maker of the note to Long. The appellants claimed that the consideration to be paid for the land embraced the payment of the note in suit. This was denied by Long. What the consideration to be paid for the land was, depended upon the contract between Long and his grantor. Necessarily the contract must have been made before the execution of the deed. It was in parol. It could be proved in no other way more effectually than by proving the conversation of the parties while conducting the negotiations which resulted in the contract. This conversation was part of the *res gestæ*, it was therefore not within the rule which prohibits hearsay evidence. It was competent. *Mitchell v. Colglazier*, 106 Ind. 464, and cases cited.

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In respect to the sufficiency of the evidence to sustain the findings of the jury, without going into details, we think there is evidence, direct and circumstantial, which fairly warrants the conclusion reached. On the whole case we think a right result was reached within the rules of law.

The judgment is therefore affirmed, with costs.

Filed Oct. 15, 1886.

No. 13,241.

FRANKLIN v. THE STATE.

CRIMINAL LAW.—*Information.*—*Description of Offence.*—*Omission of Word "Unlawful."*—*Use of Equivalent Words.*—An information charging assault and battery with intent to murder is not bad for omitting the word "unlawful" from the description of the offence, if words of equivalent meaning are used.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

ELLIOTT, J.—The information assumes to charge the appellant with assault and battery with intent to murder, and his counsel assert that it is bad for the reason that it omits the word "unlawful" from the description of the offence. This contention can not prevail.

It is well settled that an indictment or information will be upheld if it uses words of equivalent meaning to those employed by the statute in defining the offence. *Henning v. State*, 106 Ind. 386; *Riggs v. State*, 104 Ind. 261; *State v. Anderson*, 103 Ind. 170, and cases cited. The word "feloniously" is used instead of the word "unlawful," and it is a word of much more force and more comprehensive meaning than the word "unlawful." *Shinn v. State*, 68 Ind. 423;

The State v. Mason.

Hays v. State, 77 Ind. 450; Whart. Crim. Pl. & Pr., section 269.

It is obvious that an act can not be feloniously done, and yet not be unlawful. Not only does the information contain the word feloniously, but it also alleges that the appellant "did wilfully, purposely, and with premeditated malice, in a rude, insolent and angry manner, strike one Samuel Watkins with a deadly weapon, with intent then and thereby, him, the said Samuel Watkins, purposely, wilfully and with premeditated malice to kill and murder." And, as said in *State v. Murphy*, 21 Ind. 441, "One man can not strike another with the malicious and premeditated intent to murder him—murder being a technical term—without so doing unlawfully."

Judgment affirmed.

Filed Oct. 15, 1886.

No. 12,631.

THE STATE v. MASON.

108	48
139	249
108	48
147	27

CRIMINAL LAW.—*Embezzlement by Public Officer.—Repeal of Statute.*—Section 1943, R. S. 1881, defining the offence of embezzlement by public officers, was repealed by implication by the act of March 5, 1883 (Acts 1883, p. 106), upon the same subject, without any saving clause.

SAME.—*Saving Clause.*—Where a law prescribing penalties has been repealed, there can be no further prosecutions under it, unless the repealing statute contains a saving clause authorizing the same.

SAME.—*County Treasurer.—Embezzlement.—Indictment.—Statute of Limitations.*—Under section 1943, R. S. 1881, a prosecution against a county treasurer for embezzlement of public funds should have been begun within two years after such officer failed, at the expiration of his term, to pay over such funds to his successor, and the allegation of demands and refusals subsequent to that time would not take the indictment out of the operation of the statute.

From the Jay Circuit Court.

F. T. Hord, Attorney General, *O. H. Adair*, Prosecuting

The State v. Mason.

Attorney, *D. T. Taylor, J. M. Smith, T. Bailey, R. S. Gregory* and *A. C. Silverburg*, for the State.

J. P. C. Shanks, C. M. C. Shanks, L. I. Baker and *M. S. Williamson*, for appellee.

NIBLACK, J.—On the 20th day of May, 1885, the grand jury of Jay county returned an indictment against the appellee, John W. Mason, late treasurer of that county, for embezzlement. The indictment was in three counts.

The first count charged that Mason had been the duly elected, qualified and acting treasurer of Jay county for two consecutive terms, the first having commenced in November, 1878, and the last having ended on the 28th day of November, 1882; that on said last named day one John T. Hanlin became his duly elected and qualified successor in office; that during his terms in office there came into the hands of the said Mason, as such treasurer, the sum of \$50,000, the personal property of said county of Jay, which sum of money he, the said Mason, had, at the expiration of his said second term of office, failed to account for, and to pay over to the said Hanlin, as his successor in office, or to any one else lawfully entitled to receive the same; that, on the 2d day of July, 1883, the said Hanlin, then and still being treasurer of Jay county as above stated, called upon, and at said county of Jay demanded of the said Mason that he should account for and pay over to him, the said Hanlin, the said sum of \$50,000, which still remained in his, the said Mason's possession, but that he, the said Mason, then and there unlawfully, fraudulently and feloniously failed and refused to account for and to pay over said sum of money to the said Hanlin, and, in like manner, purloined, carried away, secreted and appropriated said money, and converted the same to his own use.

The second count was similar to the first, except that it charged Mason with having fraudulently failed and refused

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to account for and pay over the money in his hands to his successor in office at the expiration of his second and last term, and a further demand and felonious failure and refusal to account for and pay over such money on the 14th day of February, 1884.

The third count differed from the two preceding counts in only charging an unlawful, fraudulent and felonious failure and refusal on the part of Mason to pay over upon demand, to his successor in office, the money remaining in his hands at the expiration of his term as treasurer, on the 28th day of November, 1882.

A motion to quash all the counts of the indictment was sustained, and Mason was accordingly discharged.

The State appeals upon the ground that the indictment was sufficient in law, and that, consequently, the circuit court erred in sustaining the motion to quash it.

The propriety of the action of the circuit court in the respect complained of is sought to be maintained upon the ground that the statute on the subject of embezzlement, which was in force when Mason's second term of office expired, was repealed by the subsequent act of March 5th, 1883, on the same subject, without any saving clause as to offences previously committed, and upon the further ground that the offence charged in each count of the indictment was barred by the statute of limitations when the indictment was returned by the grand jury.

Section 1943, R. S. 1881, reads as follows: "Any county treasurer, county auditor, sheriff, clerk, or receiver of any court, township trustee, justice of the peace, mayor of a city, constable, marshal of any city or incorporated town, or any officer or agent of any county, civil or school township, city, or incorporated town; who shall fraudulently fail or refuse, at the expiration of the term for which he was elected or appointed, or at any time during such term, when legally required by the proper person or authority, to account for, deliver, and pay over to such person or persons as may be

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lawfully entitled to receive the same, all moneys, choses in action, or other property which may have come into his hands by virtue of his said office, shall be deemed guilty of embezzlement, and, upon conviction thereof, shall be imprisoned in the State prison for any period not more than five years nor less than one year, and fined in any sum not exceeding one thousand dollars, and rendered incapable of holding any office of trust or profit for any determinate period."

The act of March 5th, 1883, is in the following words: "That it shall be the duty of each clerk, sheriff, and treasurer of the several counties of this State, and every other officer receiving money in his official capacity, at the expiration of his term of office, to pay over to his successor in office all moneys of every description, to whomsoever due, remaining in his hands at the expiration of such term, taking the receipt of such successor therefor; and such successor and his sureties shall be liable therefor on his official bond, as if the same had been originally collected by him; and any clerk, treasurer, or sheriff, so failing to pay over such moneys, or any successor [of such] clerk, treasurer, or sheriff who who shall fail to pay over any moneys to parties entitled to receive the same when called on to do so, shall be deemed guilty of embezzlement, and, on conviction thereof, shall be fined in any sum not exceeding one thousand dollars, and be imprisoned at hard labor in the State prison not less than one nor more than five years." Acts 1883, p. 106.

While the law does not favor the repeal of statutes by implication, yet it is well settled that when a new statute covers the whole subject-matter of an older statute, and provides penalties for offences enumerated in the older law, the former or older law is repealed by implication. Moore Crim. Law, section 6; *Longlois v. Longlois*, 48 Ind. 60; *State v. Christman*, 67 Ind. 328; *Chamberlain v. City of Evansville*, 77 Ind. 542; *Wagoner v. State*, 90 Ind. 504.

Tested by this rule, the act of March 5th, 1883, set out as above, repealed section 1943, R. S. 1881. It covers the same

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subject-matter, and has the same general purpose in view. It provides penalties against those offending, and contains some new provisions. It omits the penalty of disfranchisement contained in the former law, and is in that respect at least essentially inconsistent with that law. It is also well settled that when a law prescribing penalties has been repealed, there can be no further prosecutions under it unless the new law contains a saving clause authorizing such further prosecutions. *Whitehurst v. State*, 43 Ind. 473; *Mullinix v. State*, 43 Ind. 511.

Consequently, when the indictment in this case was returned, the law which it, in legal effect, charged had been violated, was no longer in force.

What is now generally known as the crime of embezzlement was at one time usually treated and punished as a form or species of larceny, and it still has some features in common with larceny. It is a purely statutory crime, and for that reason its definition varies with the varying statutes of the several States. 2 Bishop Crim. Proc., section 314. It may nevertheless, in general terms, be said to be the fraudulent appropriation by one person to his own use of the money or property intrusted to his care and control by another. Abbott Law Dict., title "Embezzlement."

At the trial for embezzlement, therefore, it is essential to prove either by direct or circumstantial evidence, that the party charged has misappropriated or converted to his own use the money or property in question. Section 1943, *supra*, was enacted upon the evident theory that the fraudulent failure or refusal of a county treasurer to account for and pay over to his successor in office, at the expiration of his term of office, all the public funds in his hands, constituted sufficient evidence that he had misappropriated or converted such public funds to his own use. The fraudulent failure or refusal to account for and pay over the funds in his hands being established, no proof of a subsequent demand and refusal would have been required. A refusal to deliver upon

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demand is not a conversion. It is only evidence of a conversion, and hence in such a case proof of a subsequent demand and refusal would have afforded only redundant evidence of the misappropriation or conversion constituting the crime charged. 2 Bishop Crim. Law, section 373; *Commonwealth v. Tuckerman*, 10 Gray, 173; *Gordon v. Stockdale*, 89 Ind. 240.

Upon the facts charged in each count of the indictment in this case, the statute of limitations began to run when Mason failed to pay over the money in his hands to his successor in office, and the alleged subsequent demands and refusals did not take any of the counts out of the operation of that statute. *State v. Leonard*, 6 Cold. 307; *State v. Hunnicut*, 34 Ark. 562.

The judgment below is affirmed.

Filed Oct. 16, 1886.

 No. 13,045.

SKAGGS v. THE STATE.

CRIMINAL LAW.—Indictment.—Language of Statute.—Motion to Quash.—An indictment which, in the language of the statute, charges an assault and battery with intent to commit rape, is sufficient on a motion to quash.

SAME.—Weight of Evidence.—A judgment will not be reversed on the mere weight of conflicting evidence.

SAME.—Witness.—Interpreter.—Sign Language.—Although one may not be an adept in the sign language, he may nevertheless be a competent interpreter in the examination of a deaf and dumb witness, and the accuracy of the interpretation is a question of fact for the decision of the jury.

SAME.—Court May Appoint More than One Interpreter.—The trial court may appoint as many interpreters as it deems necessary to get the facts before the court and jury.

SAME.—Manner of Examination Through Interpreter.—Discretion.—The manner in which examinations through interpreters shall be conducted is a matter to be regulated by the trial court, in its discretion, and will not be reviewed on appeal in the absence of a showing of injury.

108	53
141	194
141	151

108	53
145	566

108	53
148	187
149	702

108	53
169	508

108	53
1171	101

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SAME.—*Modest Deaf and Dumb Witness.—Obtaining Answer to Question in Private.*—Where a question is propounded to a deaf and dumb witness which so shocks her modesty that she flees from the court room to an adjoining room, whither she is followed by an interpreter, without direction from the court or objection by the defendant, who, in such seclusion, obtains her answer to the question, and both returning immediately to the court room, the answer is given to the jury, without a repetition of the question to the witness, the irregularity is not available, in the absence of a showing of injury.

SAME.—*New Trial.—Newly Discovered Evidence.—Diligence.*—Where a new trial is asked on the ground of newly discovered evidence, it must be shown that the moving party could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial; and the facts which show such diligence must be stated.

SAME.—*Imposing Unauthorized Penalty.—Objection to Judgment.*—An error of the trial court in imposing a penalty not assessed by the jury, nor authorized by the statute defining the offence of which the defendant is found guilty, is not available on appeal unless the question was raised in the trial court by an objection, in some form, to the judgment.

From the Montgomery Circuit Court.

J. R. Courtney, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

Howk, C. J.—In this case, the indictment against the appellant, Skaggs, contained two counts. The first count charged that the appellant, on the 27th day of August, 1885, at Montgomery county, Indiana, "did then and there, unlawfully and feloniously, in a rude, insolent and angry manner, touch, push, strike and choke one Flora May Ennis, a woman, with intent then and there and thereby, her, the said Flora May Ennis, feloniously, forcibly and against her will, to ravish and carnally know." The second count of the indictment differs from the first count only in this, that the words "forcibly and against her will," appear in such second count immediately preceding the words "in a rude, insolent and angry manner," and are repeated in the conclusion of such count, with the same context as they appear in the first count.

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Upon appellant's arraignment and plea of not guilty, the issues joined were tried by a jury, and a verdict was returned finding him guilty as charged in the indictment, and assessing his punishment at imprisonment in the State prison for the term of five years, and a fine in the sum of five dollars. Over his motion for a new trial, the court rendered judgment against him upon and in accordance with the verdict.

Appellant has here assigned, as error, the overruling of his motion to quash the indictment herein. Of this error, all that is said by his counsel is contained in the following sentence: "Our objections to the indictment are, that neither count thereof states a public offence in the language of the statute, or terms equivalent thereto." Each count of the indictment charged the appellant, in the language of our statute, with an assault and battery with the intent to commit the particular felony of rape, and that, certainly, is a public offence. Sections 1911, 1917 and 1909, R. S. 1881. The motion to quash the indictment was correctly overruled.

Under the alleged error of the court in overruling appellant's motion for a new trial, many causes were assigned therefor. Of these causes, we will consider and pass upon such only as his counsel have discussed in their elaborate brief of this case. It is insisted that a new trial ought to have been granted to appellant, because the verdict of the jury was contrary to law, and was not sustained by sufficient evidence. It is not claimed, however, that there is no evidence, appearing in the record, which, if believed, would fairly sustain the verdict of the jury. The evidence is too voluminous to be even summarized in this opinion. It was conflicting in many particulars, but it can not be questioned, as it seems to us, that there was evidence before the jury which fairly supports their verdict on every material point. The credibility of the different witnesses, and the weight to be given to the evidence of each witness, were proper matters for the consideration of the jury; and where, as here, their verdict has met the approval of the trial court, it will

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not be disturbed by this court, even in a criminal cause, on what might appear to be the weight of the evidence. This is settled by our decisions. *Clayton v. State*, 100 Ind. 201; *Padgett v. State*, 103 Ind. 550; *Kleespies v. State*, 106 Ind. 383.

It was assigned as cause for a new trial, that the court erred in permitting the prosecuting witness, Flora May Ennis, who was deaf and dumb, to be examined as a witness on the trial, by and through one Charles W. Wright, as an interpreter, when it was developed by his examination that he did not understand the deaf and dumb or sign language, and was not a competent interpreter. It is enough, perhaps, to say that this cause for a new trial is not shown to be true by the bill of exceptions appearing in the record. Wright did not claim to be an adept in the deaf and dumb or sign language; but he claimed that he so far understood the language that he could well and truly interpret as well the questions that might be propounded to the deaf and dumb witness, as her answers thereunto. There is nothing in the record to show that Wright could not do all that he claimed he could do, and, certainly, nothing to show that appellant was in anywise injured by the action of the court in permitting Wright to act as an interpreter in the examination of the prosecuting witness. Our code provides (section 495, R. S. 1881), that "Interpreters may be sworn to interpret truly whenever necessary;" and, surely, we need not argue for the purpose of showing that it was necessary in this case. In Wharton's Criminal Evidence, section 449, it is said: "Sworn interpreters, in criminal as well as in civil cases, are to be appointed by the court where the witnesses do not understand the English language. It may be added that the accuracy of the interpretation of the sworn interpreter may be impeached, and is ultimately to be determined by the jury." *United States v. Gibert*, 2 Sumner, 19; *Schnier v. People*, 23 Ill. 11. So that the matter complained of, as an error of law, in this cause for a new trial, was a question of fact, and not of law, for the ultimate decision of the jury.

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Another alleged error of law, occurring at the trial, and assigned as cause for a new trial in appellant's motion therefor, was the action of the court in appointing a Miss Coons, a deaf and dumb person, as an additional interpreter, to assist Wright in the interpretation of the examination of the prosecuting witness, and in permitting the questions propounded by counsel to the prosecuting witness to be interpreted by Wright to Miss Coons, and by her to the witness, and in permitting her answers to be interpreted by Miss Coons to Wright, and by him to be given orally to the court and jury. There, certainly, was no error in the appointment of Miss Coons as an additional interpreter. The object of the examination of the prosecuting witness was to get the facts of this case, within her personal knowledge, before the court and jury; and the court had the power, undoubtedly, to appoint as many interpreters as to it seemed necessary to the accomplishment of that object. The manner in which such examination should be conducted was a matter to be regulated and controlled by the trial court, in its discretion, and will not be reviewed by this court in the absence of a showing that appellant was in some way injured thereby. But it appeared that a question, in relation to the offence charged, was propounded through the interpreters to the prosecuting witness, which shocked her innate modesty, and she fled precipitately from the presence of the court and jury into an adjoining room; that she was followed thither by Miss Coons, without any direction from the court and without any objection on the part of the appellant; that, in the seclusion of that room, Miss Coons speedily succeeded in pacifying her and in getting her answer to the shocking question, and, in about one minute, they returned together into the court room; and that there, in the presence of the court and jury, and of the witness and appellant, Miss Coons, without having repeated the question to the witness, communicated her answer thereto, obtained from her in such seclusion, to the interpreter Wright, who gave such answer orally to the court and jury.

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It is vigorously insisted on behalf of appellant, that this proceeding was erroneous, intolerable in a court of justice, and a palpable violation of his constitutional right to be brought face to face with the witness testifying against him.

In our opinion, however, the proceeding in question was not fairly open to any of the criticisms or objurgations of appellant's counsel. In some particulars the case is an anomalous one, for, to the credit of human nature, it is not often that a man is charged with an attempt, even, to gratify his passions upon the person of an unfortunate woman, forcibly and against her will, who is deprived of the sense of hearing and the power of speech. When the case occurs, however, as it must be sustained in the nature of things by the woman's evidence in relation to the offence charged, the proceedings to obtain her evidence will also be anomalous, to some extent. If it be conceded that the proceedings, of which appellant complains, were irregular or even erroneous, there is nothing in the record to show that the appellant was in any manner injured thereby. The record fails to show what the question was which shocked the modesty of the prosecuting witness, or what was her answer thereto which she communicated to Miss Coons, out of the presence of the court and jury. In this state of the record we can not say that the error under consideration was material, or in anywise injurious to the appellant. Under our criminal code, we must disregard any error in the decision or action of the court below which does not, in our opinion, prejudice the substantial rights of the defendant. Section 1891, R. S. 1881; *Clayton v. State, supra*. In other words, the record must show that the error complained of was material and injurious to the defendant; otherwise the error must be disregarded here, and will not authorize the reversal of the judgment.

A number of the causes assigned by appellant for a new trial, in his motion therefor, are simply repeated in the brief of his counsel. The questions which, as we may suppose, it was intended to present for our decision by these causes for

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a new trial, are not discussed by appellant's counsel. These questions, therefore, we regard as at least impliedly waived, and pass them by without consideration or decision.

The eleventh cause for a new trial was apparently verified by the oath of appellant, and was for alleged newly discovered evidence. It was stated, in substance, in this cause for a new trial, that appellant had discovered since the trial of this cause, that he could prove by four named witnesses, three of whom bore the same patronymic as himself, that this prosecution had its origin with Luella Skaggs, appellant's wife and the mother, by a former marriage, of the prosecuting witness herein; that Luella Skaggs procured the prosecuting witness "to make the false statements to which she testified on the examination as a witness and proceedings in this cause;" that Luella Skaggs procured and influenced the prosecuting witness, her daughter, to swear falsely against appellant, in order to procure his imprisonment and conviction; that her object therein was to rid herself of appellant, as a husband, so that she could take up another man, which she had done, in fact, since appellant's imprisonment, and had lived with such other man, as husband and wife, and that appellant's prosecution and conviction herein were simply and only the culmination of the schemes and machinations of Luella Skaggs; that all of the four witnesses, who would swear to the aforesaid facts, were residents of Montgomery county, Indiana, "and that defendant could not possibly have discovered and procured said testimony at the trial of this cause; * * * that he can not procure the affidavits of such witnesses to file in support of this ground for a new trial; * * * and that since his arrest, a long time prior to said trial, and since such trial, he had been confined in the county jail."

Considering this cause for a new trial, in its two-fold aspect of written cause and of appellant's affidavit in support of such cause, it was manifestly insufficient to entitle him to a new trial herein on the ground of newly discovered evidence. It had no support whatever, except such as was

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afforded by appellant's verification of the written cause itself. The *eighth* statutory cause for a new trial, in a criminal case, is in these words: "Newly discovered evidence, material for the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial." Section 1842, R. S. 1881. This cause for a new trial is expressed in substantially the same language as the *seventh* statutory cause, in civil actions. Section 559, R. S. 1881. In the verified cause for a new trial in the case in hand, it was not shown by any positive statement, and, if shown at all, by inference merely, that appellant was not fully informed, before and at the time of the trial, of the alleged newly discovered evidence and of the names of the witnesses. It was not shown that appellant had used reasonable diligence, or, in fact, any diligence at all, to discover and produce such evidence at the trial. In the verified cause for a new trial, the only statement on the subject of diligence is, "that defendant could not possibly have discovered and procured said testimony at the trial of this cause." This statement is merely a conclusion from facts which were not stated, and are not apparent. Appellant has nowhere stated, in this cause for a new trial, that he had used any diligence whatever, reasonable or otherwise, or that he had made any effort, and what, when and how, to discover and produce such testimony at the trial of this action. Where a new trial is asked on the ground of newly discovered evidence, it must be shown that the moving party could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial; and, in such case, it is settled by our decisions that the facts which show such reasonable diligence must be stated, and that the statement of mere conclusions will not be sufficient. *Toney v. Toney*, 73 Ind. 34; *Hamm v. Romine*, 98 Ind. 77; *Hines v. Driver*, 100 Ind. 315; *Test v. Larsh*, 100 Ind. 562.

It is assigned here, as error, that the trial court rendered a judgment imposing a penalty upon appellant which was not assessed by the jury in their verdict, nor authorized by the

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statute defining the offence of which he was found guilty and prescribing its punishment, in that it was adjudged by the court that he "be disfranchised and rendered incapable of holding any office of trust or profit for five years." This error in the judgment, for it is an error, is shown by the record of this cause; but it is an error of which appellant can not complain in this court, and for which he can not obtain a reversal of the judgment below, in whole or in part. It is not shown by the record before us that appellant either objected or excepted to the judgment, in whole or in part, or that he moved the trial court to modify such judgment, or to reject or strike out the clause therein, of which he complains here, as error, for the first time. In this condition of the record, the error of which appellant complains is not so presented here as to require of us any consideration, or to enable us to relieve him from the erroneous part of such judgment. Section 1841, R. S. 1881.

We have found no error, in the record of this cause, which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Oct. 14, 1886.

 No. 11,216.

BAKER ET AL. v. PYATT.

DEED.—*Reformation.*—*Voluntary Conveyance.*—*Valuable Consideration.*—

Equity will not intervene for the reformation of a deed which is purely voluntary; but a deed, made by a father to a son in consideration of services rendered and of love and affection, may be reformed.

SAME.—*Complaint for Reformation.*—*Showing of Consideration.*—A complaint to reform a deed made to the plaintiff by his father, which alleges that the consideration was love and affection and a specified sum of money, is sufficient on demurrer as showing a conveyance upon a valuable consideration.

108	61
124	357
108	61
136	648
108	61
138	186
108	61
144	16
144	315
145	148
146	330
146	348
147	680
108	61
150	347

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SAME.—Mutual Mistake of Fact.—Description.—Family Settlement.—A father, desiring to divide his lands among his children, executed a deed to each, intending to convey a certain portion, and each took possession of the particular tract he was to receive by the arrangement. Afterwards the plaintiff, a son of the grantor, discovered that the description which had been inserted in his deed by the scrivener, with the knowledge of both parties, did not, as they supposed it did, carry to him the tract intended to be conveyed, and of which he had taken possession, but covered a tract not owned by the father. Suit, after the death of the father, against another child, for a reformation of the deed.

Held, that the mistake was one of fact, and mutual, and that the plaintiff is entitled to a reformation.

PLEADING.—*When Judgment will not be Reversed for Want of Exhibit.*—Where the merits of a cause have been fairly determined, the judgment will not be reversed because a copy of a written instrument ought to have been filed with the complaint.

From the Vanderburgh Circuit Court.

A. Gilchrist, C. H. Butterfield, — Patterson and H. G. Taylor, for appellants.

C. A. DeBruler and E. Gough, for appellee.

ZOLLARS, J.—Appellee brought this action to have his deed corrected, and his title to the lands described in the complaint quieted, as against all claims by appellant. The deed was made to appellee by his and appellant's father, a short time before his death, and it is claimed that by mistake the land intended to be conveyed is not described in the deed, but other land which the father did not own.

The first paragraph of the complaint asks for a quieting of the title, and the second for a reformation of the deed. There is a third paragraph in the complaint, but it is apparent that the finding and judgment in appellee's favor rest upon the first and second paragraphs, if not upon the second alone. The general rule is, that where the judgment rests upon two paragraphs, one of which is fatally bad, as against the demurrer below, the judgment can not stand, but must be reversed. *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Ethel v. Batchelder*, 90 Ind. 520; *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191; *Lang v. Oppenheim*, 96 Ind. 47; *Caylor v. Roe*,

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99 Ind. 1; *City of Logansport v. LaRose*, 99 Ind. 117; *Rowe v. Peabody*, 102 Ind. 198; *Walker v. Heller*, 104 Ind. 327.

It is contended that the second paragraph is bad as against the demurrer, because neither the deed, nor a copy of it, was filed with it, or in any way made a part thereof. That contention is sustained by the case of *Overly v. Tipton*, 68 Ind. 410. Upon this point, that case has neither been approved nor questioned in subsequent cases in this court, although in some cases the copy of the deed filed with the pleading has, without question by court or counsel, been treated as a part of the pleading. *Toops v. Snyder*, 70 Ind. 554.

The case has support from the case of *Plowman v. Shidler*, 36 Ind. 484.

We do not find it necessary here to enter upon a re-examination of the question decided in the case of *Overly v. Tipton*, *supra*. After a careful examination, we have concluded that the merits of the cause have been fairly determined, and that, therefore, under our statute, the judgment should not be reversed simply because a copy of the deed was not filed with the second paragraph of the complaint. R. S. 1881, section 345; *Sohn v. Cambern*, 106 Ind. 302. The failure to file a copy of the deed, if that rendered the paragraph defective, was a matter somewhat formal in its character. It was a defect that would have been cured by verdict, had there been no demurrer, and such a defect as the above the statute requires shall be disregarded, where a cause has been fairly determined.

It is contended further by appellant's counsel, that there is no averment in the second paragraph of the complaint showing that the alleged misdescription in the deed was the result of the mutual mistake of the parties, and notwithstanding the general averment in that paragraph that the deed was made upon a valuable consideration, the special averments show that it was purely a voluntary deed, resting upon no valuable consideration whatever; and, further, that the alleged mistake was one of law, and not of fact.

It is averred in the paragraph under consideration, that

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appellee and appellant Martha (the other appellant being her husband) are brother and sister; that their father, Nathan Pyatt, who owned eighteen hundred acres of land, was desirous of dividing it among his children, taking into account advancements that each had received, and that a short time before his death, in consideration of natural love and affection, and the sum of twenty-six hundred dollars paid to him, he executed deeds to each one of the children, intending thereby to convey to each a certain and proper portion of the lands; that each one took immediate possession of his or her land so conveyed, or supposed to have been conveyed, and has since paid the taxes thereon, etc.

It is further alleged that after appellee had taken possession of the land (describing it) given to him, and after the death of the father, he discovered that his deed did not describe his land, but, by the mistake of the scrivener, had been made to describe other lands (describing them) which his father did not own; that the land first described, and of which he was in possession, was the land which the father intended to give to him, and the land which he, and all the other children, supposed he was receiving.

The use of the word "give" indicates that the land was to be conveyed to appellee as a gift simply; but the use of that word, in the way and in the connection in which it is used, would not justify a holding that there was not any valuable consideration at all. So far as the conveyance was based upon love and affection, it may be said to have been a gift, but there is a positive averment that the conveyance was made not only in consideration of love and affection, and by way of dividing the land among the children, but also in consideration of twenty-six hundred dollars paid to the grantor. The averments taken together, we think, are sufficient upon the subject of consideration to make the paragraph good as against the demurrer.

It is settled, that before equity will interfere for the correction of a mistake in a deed, it must be made to appear

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that the mistake was a mutual mistake, and a mistake of fact, and not of law.

It is shown by the averments in the second paragraph of the complaint, as we have seen, that the father's intention was to divide the whole of his lands among his children; that he did not own the land described in appellee's deed, but did own that which was taken possession of by him subsequent to, and in pursuance of, the deed to him; that the land so possessed by him was the land which the father intended to convey to him, and that which he, and all the other children, supposed he was receiving; that the deed does not describe the land thus intended to be conveyed, and which appellee supposed he was receiving, but, by the mistake of the scrivener, was made to describe other lands which the father did not own; and that appellee did not discover the mistake until after he had taken possession of the land, and after the death of his father.

These averments clearly show that the deed is not as the parties intended it should be, because it does not describe the land which the father intended to convey, and which appellee supposed was being conveyed to him. It is thus made apparent that the description in the deed is the result of a mistake, and that that mistake was mutual upon the part of the grantor and grantee, as their purpose was to have such a description in the deed as would properly describe, and carry the land which appellee subsequently possessed. And thus, too, it is made to appear, that but for their mutual mistake, and the mistake of the scrivener, the land intended to be conveyed would have been properly described. It is not averred that the grantor did not know what description was inserted in the deed, nor, indeed, is it averred that appellee was ignorant of the description so inserted. It is averred that he did not discover the mistake in the description of his land until after he had taken possession of it, and until after the death of his father, but this does not amount to an aver-

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ment that he was ignorant of the description actually inserted in the deed.

It must therefore be assumed, as against the pleader, that both appellee and the father, at the time the deed was executed, knew what description was inserted therein. What, then, was their mistake? Was it a mistake of fact? And if so, was it such a mistake as will warrant a reformation of the description by a court of equity? Or was it a mistake of law against which equity will afford no relief? In our judgment, the mistake was in no sense a mistake of law, because, as a matter of law, the description in the deed was sufficient to have carried the land described, had it belonged to the father. It will be found, upon a close examination of the cases, that the mistakes, denominated mistakes of law, were cases where the descriptions used were so defective as to convey nothing, and that the mistakes of the parties were in supposing them to be sufficient; in other words, mistakes as to the legal sufficiency of the description used.

It was held in the case of *Armstrong v. Short*, 95 Ind. 327, that the mortgage could not be reformed, because the description of the lands was defective and insufficient, and because the mistake was as to the legal sufficiency of the description, and, therefore, a mistake of law. The same may be said of the cases of *Easter v. Severin*, 64 Ind. 375, and *Easter v. Sererin*, 78 Ind. 540. See, also, *Nelson v. Davis*, 40 Ind. 366; *Nicholson v. Caress*, 59 Ind. 39; *Heavenridge v. Mondy*, 49 Ind. 434.

The mistake here, we think, was a mistake of fact. The purpose was to describe a tract of land owned by the father, and which he intended, and was attempting, to convey to the son. The mistake was in applying to that tract a description that did not describe it at all, but an entirely different tract. They supposed that the description used in the deed described the tract intended to be conveyed, and in that they were mistaken. Whether or not the description used covered the tract intended to be conveyed, we think, was a question of fact,

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and as to that fact there was a mistake. It was a fact, too, about which the parties might easily be mistaken, without being guilty of such negligence as ought to defeat a reformation of the deed. We find in some of the cases these statements: "It must be shown that words were inserted that were intended to be left out, or that words were omitted which were intended to be inserted." *Heavenridge v. Mondy, supra.* *Easter v. Severin, supra*; *Allen v. Anderson*, 44 Ind. 395; *Baldwin v. Kerlin*, 46 Ind. 426.

"It is not alleged that anything was omitted in the deed that was directed to be inserted, or that anything was inserted by mistake or otherwise, contrary to the direction of the parties." *Nelson v. Davis, supra.*

We do not question the correctness of these statements, as applied in the above cases from which we have taken them, nor as applicable generally, in actions for the reformation of written contracts, but feel sure that they should not be so applied in a case like this, as to require a holding that there can be no reformation of the description in a deed, unless it is made to appear that particular words of description were inserted that were intended to be left out, or that particular words were omitted which were intended to be inserted. Nor should it be held that there can be no reformation of the description in the deed, unless it is made to appear that at the time the deed was executed, the parties were ignorant of what that description was. To so hold, and to apply the above quoted statements literally, would be to deny relief in the larger number of cases of mistakes.

Although a deed might not contain a correct description of the lands intended to be conveyed, yet, if the particular words of the description are not those intended to be left out, or those left out are not those intended and directed to be inserted, there could be no relief. And so, if the parties, able to read and understand, should execute a deed without ascertaining its contents, they might be met with the statement, as contained in some of the cases, that they were guilty

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of such negligence as to forbid equitable relief for the correction of the mistake.

As to the mere words of the description, in the case before us, it may be said, in the general language of some of the cases, that there was no mistake, and that the deed, in that regard, is just as the parties, at the time it was executed, intended it to be. But the mistake is back of that. The words of description may be as the parties at the time consented they should be; but that consent was the result of a mistake, not a mistake of law, nor a mistake of judgment, but a mistake of fact, in that the parties mistook the description used in the deed, as being applicable to, and as covering the land intended to be conveyed. Here is the land, and here a description. Parties may readily be mistaken in locating the land from the description, and so, from several descriptions, they may readily mistake in selecting that which is applicable to, and covers the land to be conveyed. In either event and equally, the mistake is one of fact, and not of law. Courts of equity do not interfere to correct errors in phraseology, nor to eliminate or add words to a contract, simply because they may have been added or omitted by mistake, unless they are important and essential to the contract between the parties. Equity looks to the substance, and lends its aid to reform written contracts, and thus make them conform to and express the real contract as the parties intended and agreed.

The transaction between the father and children was a family arrangement. Bouvier's Law Dictionary. And, as between the children, in the nature of a family settlement and partition. Each child went into the possession of the land conveyed to him or her, and has since held that possession as the owner; and all, except appellee, as the owners of the legal title. All of the children except appellant Martha, upon the discovery of the mistake in appellee's deed, in consideration of the fact that they held and possessed in severalty the por-

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tion of the land conveyed by the father, made quitclaim deeds to appellee for the land possessed by him.

Appellant possesses and holds in severalty the land conveyed to her, and, while thus holding, is claiming as an heir, and attempting to recover from appellee, a portion of the land set apart to him by the father, and to which he would have the legal title but for the mistake in his deed. But for the family arrangement, and the consequent deeds to appellant and the other children, appellee, as an heir of his father, would be entitled to an equal share of all the lands. If appellant may hold on to what she has by virtue of that settlement and the deed to her, and share in the portion which was intended for appellee, simply because of the mistake of the parties in inserting a wrong description in his deed, so might the other children if they had chosen to do so.

The result would be that the other children could hold as against appellee what was conveyed to them, and, by sharing in what was intended for him, reduce his share to almost nothing.

A court of equity would be impotent indeed, if it could not interfere to correct the mistake in appellee's deed, and prevent the consummation of the attempted wrong. It was alleged, and found by the court, in the case of *Bush v. Hicks*, 60 N. Y. 298, that the plaintiff had contracted to sell to the defendant a certain tract of land, and furnished a description to the scrivener to be inserted in the deed. The description, although at the time thought to be correct, was not, because it embraced land not included in the contract between the parties. The parties were mistaken as to the correct description of the land intended to be conveyed. The court said: "It is claimed that, as the plaintiff knew the terms of the description inserted in his deed, and as the language employed was that intended to be used, there was no mistake. The answer is that the mistake consisted in supposing the description applied to the land intended to be conveyed, whereas it embraced much more; and a mutual mistake of this

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character is a ground for reforming a deed in equity. The counsel is mistaken in supposing that a deed can be reformed only in cases where the mistake consists in the omission or insertion of words or clauses contrary to the intention of the parties. Although the parties understood what language was contained in the deed, if they believed the description corresponded with the actual boundaries of the land intended to be conveyed, and were mistaken, the case for a reformation was made out." See, also, *Burr v. Hutchinson*, 61 Maine, 514.

And so, in one of our cases, it was said: "A party may not carelessly sign a contract and then obtain its reformation in respect to its terms and conditions; but to say that in respect to the mere description of the subject-matter of the contract, the property intended to be conveyed, * * * there can be no relief unless particular words of description had been agreed upon and others used by mistake in their stead, and unless the mistake was of such a nature that the party could not by reasonable diligence obtain knowledge of it, when put upon inquiry, would, in many, if not in most, instances, be to deny relief entirely. The act of making or accepting a deed or contract puts the party upon instant inquiry; and so the making of a mistake becomes necessarily, as, indeed, in most cases doubtless it is in fact, an act of negligence, a failure to exercise reasonable care; so that, under the rule contended for, the fact which ordinarily makes relief necessary makes it impossible. There can be no good reason, as it seems to us, for refusing to correct mutual mistakes in matters of description on account of the negligence which caused the mistake, so long as equal or superior rights of third parties have not intervened." *Morrison v. Collier*, 79 Ind. 417.

We are constrained to hold that while the second paragraph of the complaint is, perhaps, not as specific as it might be, it is sufficient to withstand the demurrer.

Upon the proper request, the trial court made a special finding of the facts, the substance of which is, that Nathan Pyatt died in July, 1879, leaving seven children, two of

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whom are the appellant and appellee; that on the second day of that month, he was the owner of lands, a part of which was that in controversy here, being that since occupied by appellee; that for the purpose of making an equal division of his property among his children, taking into consideration advancements that had been made, he executed conveyances to them of all, or about all, of his real estate, conveying to appellant two hundred and seventy-two acres, of which she took and has since held possession; that he made a conveyance to appellee, and at the time intended and declared his intention to convey to him the land here in dispute, but in giving to the scrivener the description of the land so intended to be conveyed, he, by mistake, gave a wrong description, and a description of land he did not own, and that the deed was made with such erroneous description, by the mutual mistake of the parties; that at the time and in the making of the several conveyances, he took into consideration all previous gifts and advancements to the several children, the labor done and services performed by them for him after their majority; that appellee lived nearer to him, and rendered more services to him, than the other children, and especially during the later years of his life; that at the time of the conveyance to appellee, he expressly recognized the existence of an obligation on his part to compensate him for such services; that appellee did not render the services with a view to any particular or specific compensation other than as his father might deem proper; that in consideration of such services, and in consideration of love and affection, and as a family settlement, to make an equal divide among the children, he made the deed to appellee, intending thereby to convey to him the land here in controversy, and that, since his death, the other children, except appellant, have made deeds to appellee for the land so intended to be conveyed to him.

It is settled that equity will not intervene for the reformation of a deed which is purely voluntary, resting upon no

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valuable consideration whatever. *Froman v. Froman*, 13 Ind. 317; *Randall v. Ghent*, 19 Ind. 271; *German Mutual L. Ins. Co. v. Grim*, 32 Ind. 249 (2 Am. R. 341); *Winslow v. Winslow*, 52 Ind. 8; *Schoonover v. Dougherty*, 65 Ind. 463 (467).

On the other hand, if there is any valuable consideration, no difference how small, supplemented by the consideration of love and affection, a mistake in a deed may be reformed. *Mason v. Moulden*, 58 Ind. 1. In that case, the consideration was love and affection and one dollar. It was said: "Elizabeth was a purchaser for a valuable consideration, and mere inadequacy of consideration is no ground for withholding relief by way of reforming the deed, and thus giving her what she bought, and what her vendor intended to convey, and would, but for the mistake, have conveyed. * * *

"The case is not entirely like one where specific performance of a contract is sought. Here, the vendor attempted to perform her contract, and executed a deed for that purpose. The aid of the court is required only to correct a mistake into which the parties mutually fell in the execution of their purpose, the one to convey, and the other to receive, the title to the land." See, also, *McCaw v. Burk*, 31 Ind. 56.

Upon the question of the sufficiency of consideration generally, see *Scott v. Scott*, 105 Ind. 584, and cases there cited.

Both the special finding of facts and the evidence show that the services rendered by appellee to his father were a part of the consideration for the conveyance to him. It is found that the services were not rendered by appellee with a view to any particular or specific compensation, other than as the father might deem proper. But if the father had refused to make any compensation at all, we know of no reason why appellee might not have recovered a reasonable compensation from him or from his administrator after his death. Appellee was not living with his father as a member of his family, nor was there any agreement, express or implied, that his services should be gratuitous. The father recognized

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the fact that appellee was entitled to some compensation for his services, and carried that recognition into the deed, and made the services a part of the consideration for the conveyance.

Having reached this conclusion, we need not inquire how far, if at all, the family arrangement and the conveyances to the other children might serve as a consideration for the conveyance to appellee. It is certain that appellant, having accepted her deed and the land conveyed, and holding the land in severalty, is not in a very favorable position to question the consideration for the conveyance to appellee.

The father apportioned to each child the particular tract of land intended for him or her. His intention was to convey to appellee the land here in controversy, and, to consummate that purpose, furnished to the scrivener a description which he supposed was the proper description of that land. In this he was mistaken.

The special finding and the evidence show that the tract intended for appellee was selected before the deed was made, and that in that selection appellee, as all the other children, acquiesced. He consented and agreed that the land thus selected should be the portion to be conveyed to him, upon the consideration heretofore stated. He supposed that the description, furnished by the father and inserted in the deed, was a proper and correct description of that land. In that he was mistaken. And thus there was a mutual mistake, such as a court of equity, under all the circumstances of this case, will correct.

We need add nothing here to what has been said in disposing of the questions raised by the demurrer to the complaint.

We have examined all of the questions discussed by counsel and are satisfied that the judgment should be affirmed.

Judgment affirmed, with costs.

Filed Oct. 26, 1886.

The State, *ex rel.* Adams, *v.* The Mayor and Common Council of Kokomo.

No. 9279.

THE STATE, EX REL. ADAMS, *v.* THE MAYOR AND COMMON
COUNCIL OF THE CITY OF KOKOMO.

RAILROAD.—*Donation by City.—Resident Freeholders, How Enumerated.—Statute Construed.*—In ascertaining the number of resident freeholders so as to determine numerically whether a petition for a city to make a donation in city bonds, to aid in the construction of a railroad, is signed by a majority, as required by the statute, R. S. 1881, section 3153, all persons resident within the city, and owning a freehold interest in land, must be counted.

From the Madison Circuit Court.

N. R. Lindsay, M. Bell, M. McDowell, J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

J. O'Brien and J. W. Kern, for appellee.

MITCHELL, J.—The Frankfort and Kokomo Railroad Company applied for a mandate to compel the mayor and common council of the city of Kokomo to pass an ordinance providing for the issue of bonds, so as to make a donation of \$8,000 to aid in the construction of the appellant's railroad, in pursuance of an alleged petition in that behalf, by a majority of the resident freeholders of the city. The petition was in two paragraphs.

The first paragraph charged that a majority of the resident freeholders of the city, over the age of twenty-one years, had petitioned, and that the railroad company had performed all the conditions to be performed on its part necessary to entitle it to the donation, but that the common council had, notwithstanding the petition of the freeholders and the performance of the company, refused to make the donation.

The second paragraph was the same in substance as the first, except that it averred that a majority of the resident freeholders of the city, "not including infants, idiots, insane persons, and married women," had petitioned the common council to make the donation.

The case was here once before, and the facts will be found

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more fully stated in the report of the former appeal. *Mayor, etc., v. State, ex rel.*, 57 Ind. 152.

Section 3153, R. S. 1881, in force May 4th, 1869, reads as follows:

"Any city incorporated under the general laws of this State, upon petition of a majority of the resident freeholders of such city, may hereafter subscribe to the stock of any railroad, hydraulic company, or water power running into or through such city, or near the corporate limits of said city, or to make, on petition of the majority of the resident freeholders of such city, donations in money or the bonds of such city, to aid in the construction of any such railroad, hydraulic company, or water power, subject, however, to the limitations, direction, and restriction named in the provisos to the sixtieth section of the act entitled 'An act to repeal all general laws now in force for the incorporation of cities, prescribing their powers and rights, and the manner in which they shall exercise the same, and to regulate such other matters as properly pertain thereto,' approved March 14th, 1867."

The only question before us is as to the sufficiency of the petition.

It will be observed, the statute set out above provides that "on petition of the majority of the resident freeholders of such city," donations in money or the bonds of such city may be made, to aid in the construction of any railroad, etc.

The petition before us alleges in one paragraph, that a majority of the resident freeholders over the age of twenty-one years petitioned. In the other, that the petitioners constituted a majority of the resident freeholders, "not including infants, idiots, insane persons, and married women."

The court below sustained a demurrer to the application for a mandate, on the ground that the alleged petition was not in compliance with the statute.

The appellant seeks to demonstrate the impropriety of this ruling, upon the hypothesis that where the phrase "resident freeholders" or "disinterested freeholders" occurs, as it often

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does in various statutes of the State, it is to be taken universally, and without exception, as meaning adult land-owners competent in law to contract and be contracted with.

Statutes, some thirty or more in number, are referred to in the briefs, in which the performance of certain duties, or the exercise of certain powers, is required to be committed to three or more residents, or disinterested freeholders, as the case may be.

These statutes make provision for the appointment of viewers or appraisers in partition, highway, condemnation, drainage, and various other proceedings, and require the appointment of freeholders to examine and report to the court, or other appointing body, in respect to the matters committed to them.

The appellant's argument is, that persons who are under legal disabilities are not freeholders within the contemplation of these several statutes, and because not in these, it must be supposed that such persons were not included in the legislative intent in the statute which requires a majority of the resident freeholders to petition, before the common council of a city can acquire jurisdiction to make a donation to a railroad or other public improvement.

Without undertaking to determine what other qualifications are required by resident or disinterested freeholders, upon whom the powers and duties prescribed in the several statutes referred to are conferred, we have no doubt that in ascertaining the number of resident freeholders in a city, a majority of whom are required to petition, before its common council can acquire jurisdiction to act upon the subject of making a donation, all resident freeholders are to be counted.

The common council could not be compelled to act, except upon the petition of a majority of the resident freeholders of the city. Until such petition was presented, the council had no jurisdiction to act. The term "resident freeholders" must be understood in its ordinary meaning. When so understood and applied, it means all persons who reside within

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the city, and who are the owners of an estate in lands within the city amounting to a freehold interest. *Damp v. Town of Dane*, 29 Wis. 419; *People v. Hynds*, 30 N. Y. 470.

We agree with all that has been said in respect to the rules for the construction of statutes, and especially that a construction which leads to absurd consequences must, if possible, be avoided. There is, however, in this case little room for construction, and absolutely no danger or opportunity for absurd consequences.

The Legislature prescribed the conditions upon which the jurisdiction of the common council should attach, in order that a city might impose a burden upon the property and make a donation in aid of a public work.

It was within the power of the Legislature to have fixed any arbitrary number as requisite to invoke the jurisdiction of the common council by petition. This number has been authoritatively fixed at a majority of the resident freeholders of the city. It is not for the courts to give this language such a construction as that it shall mean something different from what it plainly says. The construction contended for would require a reading of the statute so essentially different from that required by the language in which it is written, that we find ourselves unable to adopt the view so vigorously insisted upon in the appellant's behalf.

If we should concede that in the appointment of persons to make partition of real estate, or to act as appraisers, viewers, commissioners, etc., none but persons capable of contracting are eligible, it would not follow that, in ascertaining the whole number of resident freeholders in a given city, with a view of determining whether or not a majority had signed a petition, any resident freeholder, whether under legal disability or not, should be excluded.

There was no question of disability involved. The sole question was as to the number of resident freeholders within the city, and whether or not the petition presented was signed by a majority of the whole number.

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Whether persons who were under legal disabilities at the time the petition was signed were competent petitioners, is in no way made a question, and is not decided. What we decide is, that in ascertaining the number of resident freeholders, so as to determine numerically whether the petition is signed by a majority, all persons resident within the city, and owning a freehold interest in land therein, must be counted.

The cases of *Osgood v. Breed*, 12 Mass. 525, *Wilbur v. Crane*, 13 Pick. 284, and *Turner v. Cook*, 36 Ind. 129, are, in our opinion, not analogous to the case under consideration.

The judgment is affirmed, with costs.

Filed Oct 26, 1886.

No. 12,562.

SEAVEY ET AL. v. WALKER ET AL.

SALE.—Personal Property.—Bill of Sale.—Evidence to Show that it is Only a Mortgage.—In the enforcement of equitable rights, parol evidence may be given to show that a bill of sale of personal property, absolute on its face, is in fact only a mortgage to secure the payment of a debt.

SAME.—Fraud.—Evidence.—Where the evidence as to whether a sale of personal property was bona fide or fraudulent is conflicting, the finding of the trial court will not be disturbed on appeal.

SAME.—Change of Possession.—What not Sufficient.—Statute of Frauds.—Where the vendor and his employee remain in actual possession of a stock of merchandise, the fact that the latter, under authority conferred by the purchaser, is in control of the goods, is a mere constructive change of possession, and the sale, under section 4911, R. S. 1881, is void as against creditors and subsequent purchasers.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. H. Kaufman and W. H. Branyan, for appellants.

B. F. Ibach, L. P. Milligan and O. W. Whitelock, for appellees.

NIBLACK, J.—On the 23d day of June, 1884, Jacob Lew

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was, and for some time previously had been, engaged in the tin, stove and liardware business at the town of Markle, in Huntington county. He was at that time indebted to Gideon W. Seavey in a sum of money ranging somewhere between seven hundred and one thousand dollars, and to the firm of Morgan & Beach in about the sum of four hundred and forty dollars. Being unable to pay these sums of money, and otherwise in a pecuniarily embarrassed condition, Lew agreed to sell and transfer to the said Seavey, and the said Morgan & Beach, all his goods on hand, including his tools, stock in trade, notes, accounts, and a wagon and team, in consideration of the sum of one thousand dollars, to be applied *pro rata* on the indebtedness above described, and on the day named executed a memorandum in writing, in the similitude of a bill of sale, purporting to sell and transfer to the said Seavey and the said Morgan & Beach the property in question. But this instrument in writing was not recorded. It was further agreed, but not in writing, that Lew should continue in possession of the property, and carry on the business in which he had been so engaged, as formerly, and account to the said Seavey and to the said Morgan & Beach for the money which he might collect on the notes and accounts, or otherwise realize from the business.

There was evidence tending to show that for these services Lew was to receive a commission of ten per cent. on sales and collections.

Lew continued in possession of the property and business until the 28th day of August, 1884, when he executed a chattel mortgage on the property remaining in his possession, to Leonard S. Walker, Henry J. Ash, Mrs. Murray and the firm of Rinesmith & Simonton to secure the payment of debts severally due them, and which, with a slight exception, had been contracted prior to June 23d, 1884.

On the 4th day of September, 1884, Walker and his co-mortgagees commenced this suit against Seavey and Lew to foreclose the chattel mortgage, executed as above, and to en-

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join them from interfering or intermeddling with the mortgaged property.

The circuit court, after hearing the evidence, found for the plaintiffs, and, in addition to rendering personal judgments against Lew for the several debts described in the complaint, decreed a foreclosure of the mortgage and an injunction, as prayed for, against the defendants.

Complaint is only made of the refusal of the circuit court to grant a new trial, and, in support of that complaint, it is insisted that the finding was not sustained by sufficient evidence.

The controlling question made at the trial was upon the nature, good faith and validity of the alleged sale and transfer of the mortgaged property to Seavey and Morgan & Beach. During the entire transaction, including the defence of this suit, Seavey acted as the representative of Morgan & Beach, as well as in his own behalf.

Section 4911, R. S. 1881, enacts that "Every sale made by a vendor, of goods in his possession or under his control, unless the same be accompanied by immediate delivery, and be followed by an actual change of the possession of the things sold, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith, unless it shall be made to appear that the same was made in good faith and without any intent to defraud such creditors or purchasers."

It was, therefore, incumbent on Seavey, in this case, to remove the presumption of fraud which resulted from Lew's continuance in possession of the property in controversy after its sale and transfer as already stated. On that branch of the case the evidence was conflicting. Seavey proved the existence and validity of his debt against Lew; also, the same as to the debt held by Morgan & Beach.

There was also evidence tending to prove that at the time he, Seavey, purchased the property, he did not know that Lew owed any other debts, and that when Walker and his

co-mortgagees took the chattel mortgage, they had full notice of Seavey's and his associates' claim of title under their purchase from Lew.

On the other hand, there was evidence tending to show that the circumstances connected with the alleged purchase by Seavey and his associates were unusual in such transactions; that no invoice of the property was taken, or itemized estimate of its value made; that the property was really worth more than \$2,000; that the agreed amount of the purchase-money was never entered as a credit on the debts due Seavey and his associates respectively, but these parties continued to hold these debts as an unsatisfied indebtedness against Lew; that Seavey and his associates, as well as Lew, from the first had treated the alleged purchase of the property as a mere security for the payment of such indebtedness, and hence not as an absolute sale within the proper meaning of that phrase. *Pierce Mortgages of Merchandise*, sections 77, 78, 79.

Other facts and circumstances, having some bearing upon the question in issue, were respectively put in evidence. As the case is thus presented, we are not permitted to disturb the finding made by the circuit court.

In the enforcement of equitable rights, it is well settled by a long line of decisions, that parol evidence may be given to show that a deed to real estate, absolute in form, was only intended to be, and was in fact only, a mortgage to secure the payment of a debt. *Crane v. Buchanan*, 29 Ind. 570; *Beatty v. Brummett*, 94 Ind. 76; *Cox v. Ratcliffe*, 105 Ind. 374.

The same rule applies to bills of sale of personal property absolute upon their face. *Jones Chat. Mortg.*, sections 14, 15, 21, 22, *et seq.*; *Herman Chat. Mortg.*, sections 20 and 21.

If the bill of sale in evidence in this case was, in legal effect, only a mortgage, as the circuit court may have concluded it was, then it was void for not having been recorded within ten days after its execution. R. S. 1881, section 4913.

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While Seavey was on the stand as a witness in his own behalf, it was proposed to prove by him that before the execution of the chattel mortgage he had taken the goods and chattels in suit out of the possession of Lew, and had placed them in the possession and under the control of a man who was then, and for several months, at least, had been, in the employment of Lew in the management of his business; but the proposed evidence was excluded.

That ruling of the circuit court was not materially erroneous, for two reasons:

First. Because no question was either asked, or proposed to be asked, of the witness, leading up to, or laying a foundation for, the offered proof. *Higham v. Vanosdol*, 101 Ind. 160.

Secondly. Because, in the state of the evidence as it then existed, the proposed proof would have been immaterial.

It had already been fully established that there had been no visible change of the possession of the goods and chattels following their alleged purchase by Seavey and his associates; that Lew, with the assistance of his employee in question, had continued in actual possession until after the execution of the chattel mortgage to Walker and his associates. Under such circumstances an authority conferred on the employee to take possession and control of the goods and chattels could not have amounted to more than a constructive change of possession, which was not a sufficient compliance with the statute herein above set out. The following authorities have some bearing on the questions involved in this appeal: *Bump Fraudulent Conv.* 139; *Nutter v. Harris*, 9 Ind. 88; *Kane v. Drake*, 27 Ind. 29; *Adams v. Cosby*, 48 Ind. 153; *Robinson Machine Works v. Chandler*, 56 Ind. 575; *Rose v. Colter*, 76 Ind. 590; *Dessar v. Field*, 99 Ind. 548; *Ourme, Dunn & Co. v. Rauh*, 100 Ind. 247.

The judgment is affirmed, with costs.

Filed Oct. 26, 1886.

Warburton v. Crouch *et al.*

No. 12,043.

WARBURTON v. CROUCH ET AL.

NEW TRIAL AS OF RIGHT.—*Not Proper in Suit to Set Aside Fraudulent Conveyance.*—A new trial as of right is not allowable in an ordinary suit to set aside a fraudulent conveyance of land.

SAME.—*Judgment Resting on Paragraph to Set Aside.*—*New Trial not Proper.*—Where the record on appeal shows that the judgment rests on a paragraph of complaint to set aside a fraudulent conveyance of real estate, a new trial as of right can not be granted although there may be other paragraphs seeking to quiet title or recover possession.

SAME.—*New Trial Proper in Suit to Revest Title to Land Obtained by Fraud.*—A new trial as of right is proper in a suit to revest title in an owner whose land has been obtained from him by fraud, and subsequently conveyed to a fraudulent grantee.

SAME.—*Second Application within Statutory Period.*—The fact that the court erroneously denied a new trial as of right does not exhaust the power of the court to grant a second application within the statutory period.

From the Boone Circuit Court.

J. A. Abbott and *H. C. Wills*, for appellant.

O. P. Mahan, for appellees.

ELLIOTT, J.—There are two paragraphs in the appellant's complaint, the first is for the recovery of real estate, and the second charges that the land was obtained from the appellant by fraud, and that it was afterwards fraudulently conveyed to one of the appellees.

Issue was joined by answer of general denial. The first trial resulted in a verdict and judgment for the plaintiff, and it was decreed by the court that the conveyance be set aside and the appellant's title to the land quieted.

On the motion of the appellees, the court granted them a new trial as of right, and the second trial resulted in a judgment in their favor.

The appellant unsuccessfully moved to strike the appellees' motion for a new trial from the files, and reserved exceptions. He also excepted to the ruling granting the appellees a new trial as of right.

We agree with the counsel for the appellant, that a new

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trial as of right can not be allowed in an ordinary suit to set aside a fraudulent conveyance of land. *Perry v. Ensley*, 10 Ind. 378; *Truitt v. Truitt*, 37 Ind. 514; *Shular v. Shular*, 56 Ind. 30; *Adams v. Wilson*, 60 Ind. 560; *Butler University v. Conard*, 94 Ind. 353.

We also agree that where the record shows that the judgment rests on a paragraph of a complaint to set aside a fraudulent conveyance of real estate, a new trial as of right can not be granted, although there may be other paragraphs seeking to quiet title or recover possession. *Bradford v. School Town of Marion*, 107 Ind. 280; *Williams v. Thames, etc., Co.*, 105 Ind. 420; *Butler University v. Conard*, *supra*; *Jenkins v. Corwin*, 55 Ind. 21.

But, while we agree with appellant's counsel as to these legal propositions, we can not agree that they apply to the case before us. This is not an ordinary suit to set aside a fraudulent conveyance and subject the land to the claims of creditors, but it is a suit to revest title in an owner whose land had been obtained from him by fraud, and subsequently conveyed to a fraudulent grantee. The title to the land was directly in question and was necessarily adjudicated. In truth, the second paragraph of the complaint is nothing more than a claim for the recovery of real estate, specifically set forth. The case is, therefore, fully within the doctrine declared in *Adams v. Wilson*, *supra*, and a new trial was demandable as of right. *Physio-Medical College v. Wilkinson*, 89 Ind. 23.

It is insisted that as the first motion for a new trial as of right was denied by the court, it had no authority to grant the second motion. This position can not be maintained. The statute in express terms gives the right to a new trial, and it is clearly error to refuse it. This right remains open for the period of one year, and it seems quite clear to us that the court may do what the statute commands, although it may once have erroneously refused to obey the statutory mandate. It is perhaps true that the proper course for the parties

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to have taken was not pursued, but our decisions establish the rule that if a right result is reached there can be no reversal although the regular road was not travelled. Here a right result was reached, and, although the mode adopted was not the proper one, still substantial justice was done.

Judgment affirmed.

Filed Oct. 14, 1886.

No. 12,644.

FORDICE v. SCRIBNER ET AL.

WRITTEN CONTRACT.—*Parol Contradiction of.—Debtor and Creditor.—Release of Indebtedness.—Contemporaneous Parol Agreement.*—Where there is a written contract between creditors and their debtor, made in consideration of a transfer by the latter of certain property to a trustee for the former, that the creditors will release and discharge the debtor from his indebtedness to each of them, it can not be limited or contradicted by a creditor by showing a contemporaneous parol agreement with the debtor excepting certain notes from the terms of the written contract.

PROMISSORY NOTE.—*Partnership.—Firm Note for Individual Debt.—Assumption of Payment by Firm.—Pleading.—Matter for Reply.*—Where, in an action upon a promissory note executed in the firm name of a partnership, it is answered by the administrator of one partner that the other partner, a co-defendant, executed the note without the knowledge or consent of the decedent and for an individual debt, the plaintiff, if he relies upon an assumption of the payment of the debt by the firm, must reply the assumption.

PLEADING.—*Reply to Several Paragraphs.—Demurrer.*—A reply which is not good as to all the paragraphs of answer to which it is addressed, is bad on demurrer.

From the Floyd Circuit Court.

J. H. Stotsenburg, for appellant.

ZOLLARS, J.—This action by appellant is against Benjamin F. Scribner and the administrator of the estate of Horatio Scribner, deceased.

It is alleged in the complaint, that in 1872 Benjamin F. and Horatio Scribner, by their firm name of Scribner & Son,

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executed to H. N. Devol three promissory notes for the aggregate amount of twelve hundred dollars, which after maturity were assigned to appellant.

The fourth paragraph of answer by the administrator is, in substance, that the payee, Devol, in 1877, and before he had assigned the notes, for a valuable consideration, fully and entirely released and discharged Benj. F. Scribner, who was jointly liable upon the notes with Horatio Scribner, the decedent, from all liability upon and on account of the notes, and thereby released the decedent. A copy of the so-called release, which is more a contract for a release, is filed with the answer, as a part of it, and is as follows: "In order to save ourselves the expense and costs of bankruptcy proceedings against Gen. Benj. F. Scribner, and to save him also from the mortification thereof, we authorize him to transfer and set over at once to Salem Town, all the stock of drugs and medicines (except the amount which is allowed by the bankrupt law), who shall proceed to sell such stock at public or private sale, as soon as possible, and divide the net proceeds *pro rata* among us, and we, and each of us, agree, in consideration of such transfer, to fully and completely release and discharge the said Scribner from his said indebtedness to us, and each of us, and to execute formal releases of such indebtedness to him at any time, he paying the expense of such release, if any. We will execute said releases as soon as said transfer is made to said Town."

Devol, the payee of the notes in suit, appellant, and a large number of other creditors of Gen. Scribner signed the foregoing agreement.

Benj. F. Scribner also filed an answer, the first and second paragraphs of which set up the foregoing agreement, and allege that the stock of drugs was turned over to Town as therein provided for, and that he was thereunder and thereby released and discharged from all liability upon the notes in suit.

One paragraph of appellant's reply is to the fourth para-

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graph of answer by the administrator and the above mentioned first and second paragraphs of answer by Benj. F. Scribner. That reply is, in substance, that at the time the written agreement was executed, it was orally agreed by and between Devol, the payee, Benj. F. Scribner, and Horatio Scribner, the decedent, that the written agreement or release should not apply to, or affect in any manner, the debt evidenced by the notes in suit, and that in consideration of that agreement Devol signed the agreement or release.

The court below sustained a demurrer to the reply, and that ruling is assigned as error. Before it can be said that the court below erred in that ruling, it must be determined that the reply is sufficient to meet the several paragraphs of answer to which it is directed. *Falmouth, etc., T. P. Co. v. Shawhan*, 107 Ind. 47.

It will be observed that the writing signed by Devol, a copy of which is filed with and as a part of the answers, is not a receipt, nor a release simply, from a single party to another with no consideration stated, as was the case in *Scott v. Scott*, 105 Ind. 584. The writing is rather a contract for a release, upon the stated consideration that Benj. F. Scribner should turn over his stock of drugs, etc., to Town, to be by him sold, and the proceeds distributed *pro rata* upon the debts due to the signers.

There is also a positive and unconditional agreement on the part of the signers to release and discharge Benj. F. Scribner from his indebtedness to them and each of them. At the time the written agreement was executed, Devol held the notes in suit, executed by Scribner & Son, a firm composed of Benj. F. Scribner and Horatio Scribner, the decedent.

The liability of Benj. F. upon those notes was an indebtedness from him to Devol, and, so far as shown by the answers and reply under consideration, that was the only indebtedness from Benj. F. to him. The plain reading of the writing executed by Devol and the other creditors is, that for the

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consideration stated, they would release and discharge Benj. F. from all his indebtedness to them, or either of them.

We are met *in limine* with the question, can it be shown, as against Benj. F., that by a contemporaneous parol agreement, the indebtedness evidenced by those notes was not within the terms of the written agreement? If it can not, the reply is bad, and the demurrer to it was properly sustained.

A general receipt may be explained or contradicted by parol. But if a receipt also embodies a contract, that contract may not be varied or overthrown by parol evidence. Wood's Pr. Ev., pp. 68-72.

And so may a release, executed in the manner, and coming in question as in the case of *Scott v. Scott*, *supra*, be explained by parol. But as we have said, the writing here is not a receipt, nor a release, as in that case. Here, we have a written contract; and to hold the reply good, would be to hold that the terms of that contract may be varied and limited, and, as to Devol, entirely overthrown, by showing a contemporaneous parol agreement, excepting from the terms of the written agreement, the only indebtedness from Benj. F. to him, so far as shown by the pleadings under examination. The written agreement can not be thus varied and contradicted; and especially is this so, as it is an agreement between the debtor and his creditors. *Van Bokkelen v. Taylor*, 62 N. Y. 105; *Pierson v. Hooker*, 3 Johns. 68; *Acker v. Phoenix*, 4 Paige Ch. 305; *Rowe v. Thompson*, 15 Abb. Pr. 377; 2 Parsons Cont. 715.

It is alleged in one of the answers by Benj. F., that he turned over to Town the stock of drugs, as in the agreement provided. Having thus turned over the property in accordance with that agreement, he was discharged from all liability upon the notes in suit.

The reply is not good as to all the paragraphs of answer to which it was directed, and hence the demurrer thereto was properly sustained. Such being the case, it is not necessary for us to go into the question as to whether the release of

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Benj. F. operated as a release of Horatio, the decedent. There is no brief on the part of appellee, and hence we have not the means of knowing the exact grounds upon which the court below sustained the demurrer to the reply. We must presume in favor of the ruling of the court below, and hence may assume here that the demurrer was sustained, because the reply was not a sufficient reply to all of the paragraphs of the answer to which it was directed.

It is further contended, that appellant's demurrer to the tenth paragraph of the administrator's answer should have been sustained by the court below. That answer is, in substance, that the debt for which the notes were given was the individual debt of Benj. F. Scribner, and that he executed the notes in the firm name without authority, and without the knowledge or consent of the partner, Horatio, and that Devol took the notes with full knowledge of those facts.

The objection urged to this answer is, that it is not averred therein that the firm had not assumed and agreed to pay the debt, notwithstanding it was the private debt of Benj. F. Scribner.

If, by the averments that Benj. F. executed the notes without authority, and without the knowledge or consent of his partner, it does not sufficiently appear that the firm had not assumed the payment of the debt, yet the answer was not bad. If appellant relied upon such an assumption, he should have brought it forward by a reply.

It is also contended that the debt is shown by the evidence to have accrued after the release was executed. That the notes were executed and delivered in 1872, some five years before the release was executed, is beyond question. Devol testified that while he held the notes Benj. F. conveyed to him a tract of land sufficient in value to have paid the notes, but that it was taken from him upon an outstanding mortgage after the execution of the release. His theory is, that after the conveyance to him, and until the foreclosure of the mortgage, he held the notes as collateral security, and that

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after the land was taken from him upon the mortgage, the notes again became a debt in the full sense.

It is sufficient to say that the release was complete and full, and discharged Benj. F. from all liability upon the notes, whether held as collateral security or otherwise by Devol, and that the land transaction did not change the matter. It clearly did not create a new debt subsequent to the release.

Finding no error for which the judgment should be reversed, it is affirmed, with costs.

HOWK, J., did not participate in the decision of this case.

Filed Oct. 28, 1886.

108	90
126	504
108	90
164	668

No. 12,726.

KYLE ET AL. v. MILLER ET AL.

HIGHWAY.—*Public Utility.*—*Question for Jury.*—*Conflicting Evidence.*—*Supreme Court.*—The question as to the public utility of a proposed highway is one of fact, and where the evidence is conflicting the verdict of the jury will not be disturbed on appeal.

SAME.—*Damages.*—*Instructions.*—The question of the amount of damages sustained by a land-owner is one for the jury under proper instructions, and where the evidence is conflicting their verdict will not be disturbed on appeal, unless they have been erroneously instructed.

SAME.—*Evidence as to Different Line.*—In highway cases it is not error to exclude evidence tending to prove a line of highway different from that proposed to be opened, and not affecting its utility.

EVIDENCE.—*Examination of Witness.*—*Leading Questions.*—*Discretion of Court.*—Where there is no abuse of its discretion by the trial court, in permitting leading questions, there can be no reversal on such ground.

From the Kosciusko Circuit Court.

C. Clemans, for appellants.

ELLIOTT, J.—The question whether a proposed public highway will or will not be of public utility is one of fact. It is not a question of law to be determined by the court,

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except, possibly, in cases where the facts are undisputed. Where there are considerations for and against the utility of the highway, the question is properly for the jury.

In this case the contested question was whether the proposed highway would be of public utility; and as there is conflicting evidence upon this question of fact, we must, under the firmly settled rule, decline to interfere with the verdict of the jury.

The question of the amount of damages sustained by a land-owner is one for the jury under proper instructions from the court, and where there is conflicting evidence upon this question, the Supreme Court will not interfere unless the jury has been erroneously instructed.

In highway cases it is not error to exclude evidence tending to prove a line of highway different from that proposed to be opened, and not affecting its utility. We think the evidence excluded in this case was as to a different line of highway, and one not affecting that proposed to be opened. If, however, we are wrong in this, still there was no error in excluding the evidence offered by the appellant, because his offer was to prove by parol a conveyance of land. It is hardly necessary to add that the best evidence of the conveyance was the deed.

The trial court has a liberal discretion upon the subject of permitting leading questions to be asked, and many courts hold that a judgment will not be reversed because the trial court allowed a leading question to be propounded, but we need not go that far in this case, for there was clearly no abuse of discretion by the trial court.

Judgment affirmed.

Filed Oct. 26, 1886.

East v. Peden.

No. 12,760.

EAST v. PEDEN.

REAL ESTATE.—Action to Recover.—General Denial.—Equitable Defence.—Evidence.—In actions to recover possession of real estate, any facts which show that, according to the principles of equity, as applied by courts of chancery, the plaintiff ought not to recover, may be given in evidence under a statutory general denial.

SAME.—Equitable Defence Defined.—Any state of facts which will entitle the defendant to the reformation of an instrument, or which would, under the former practice, if set up in a bill for that purpose, invoke the aid of a court of chancery for relief against the claim or title put forward by the plaintiff, is an equitable defence.

SAME.—Equitable Title in Third Person.—Privy.—Deed.—Description.—Mistake.—In an action to recover possession of real estate, the defendant can not defeat a recovery by showing that a third person, with whom he is not in privy, is the equitable owner of the land in controversy through a deed previously made by the plaintiff, by which it was intended to convey the same to him, but which, by mistake, did not describe the land, and under which the defendant asserts no claim.

SAME.—When Equity in Third Person is an Available Defence.—The outstanding equity in a third person which is available to a defendant in possession, without title, against a legal title in the plaintiff, must be such an equity as the defendant would have the right, by making proper parties, to invoke the aid of a court of chancery to enforce in his favor.

From the Sullivan Circuit Court.

A. G. Cavins, E. H. C. Cavins, W. L. Cavins, J. T. Hays and H. J. Hays, for appellants.

D. E. Beem and W. Hickam, for appellee.

MITCHELL, J.—The questions presented for decision in this case arise upon the following facts: On the 1st day of April, 1855, Thomas Shepherd died intestate, seized of certain real estate in Greene county, leaving as his only heirs, his widow, Rebecca Shepherd, and Lealdus Shepherd, a son. The widow and son inherited the land in equal shares as tenants in common. On the 24th day of August, 1857, while yet the widow of her deceased husband, Rebecca Shepherd made a conveyance by which she intended to convey to Eli Adams her interest in the real estate which she inherited from her husband,

108 92
131 27

108 92
147 155

108 92
153 652

108 92
160 280

but which conveyance, through an alleged mistake in the description, did not embrace any of the lands in controversy. This deed recites that it was made upon a consideration of two hundred dollars. It was duly recorded.

On August 30th, 1857, six days after the deed was made, Rebecca Shepherd intermarried with John East, and, remaining in possession meanwhile, on the 19th day of January, 1865, during her second marriage, she and her husband joined in a quitclaim deed for her interest in the land, to Hughes East, who in the same year conveyed to the appellee. From that time forth the appellee has been in possession.

Treating the conveyance made during her second marriage as void, within the prohibition of the statute concerning the alienation of real estate, held in virtue of a previous marriage, during a second or subsequent marriage, Rebecca East commenced this suit against the appellee in the Greene Circuit Court to recover possession of the undivided one-half of certain described lands.

The complaint was in the usual form for the recovery of real estate, and the issue was made by an answer of general denial.

That the appellee took no title through the deed made to Hughes East, during the appellant's second marriage, is conceded on all hands. He had judgment below, nevertheless, upon the theory that it was competent for him to show title out of the plaintiff, by proving that Adams was the equitable owner of the land in controversy through the deed made in 1857, by which it was claimed the appellant intended to convey her interest to him, notwithstanding the land in dispute was not described in that deed.

By exceptions to the admission of evidence, and otherwise, the questions presented for decision may be comprehended under the following propositions:

1. Admitting the validity of the defence upon which the appellee prevailed in the court below, was it competent to

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make such defence under the general denial, without an answer, or other pleading asking affirmative relief?

2. The appellee being in no wise in privity with, and having asserted no claim under the deed to Adams, in which the alleged misdescription was found, was he in a situation to show the mistake, and avail himself of that deed as a defence, by any method of pleading which he might have resorted to.

Respecting pleadings in actions for the recovery of possession of real property, section 1055, R. S. 1881, enacts that "The answer of the defendant may contain a denial of each material statement or allegation in the complaint; under which denial, the defendant shall be permitted to give in evidence every defence to the action that he may have, either legal or equitable."

As to what constitutes an equitable defence, the better view, and that supported by the weight of authority, seems to be that any state of facts which would entitle the defendant, in a proper case, to the reformation of an instrument, or which would, under the former practice, if set up in a bill for that purpose, invoke the aid of a court of chancery for relief against the claim or title put forward by the plaintiff, would be a defence coming within that definition.

In cases where it is necessary to plead an equitable defence, in order to make it available, such defence may be pleaded to bar the plaintiff's right of recovery, without asking affirmative relief; while in actions, such as this, governed by section 1055, above set out, equitable defences are available under the general denial.

Under a statutory denial, any facts which show that according to the principles of equity, as applied by courts of chancery, the plaintiff ought not to recover possession of the land in controversy, may be given in evidence to defeat a recovery. Sedgwick & Wait *Trial of Title to Land*, secs. 477-488; Pomeroy *Rem. and Remedial Rights*, secs. 90, 91, and notes; *Hoppough v. Struble*, 60 N. Y. 430; *Cavalli v. Allen*, 57 N. Y. 508; *West v. West*, 89 Ind. 529; *Schenck v. Kelley*,

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88 Ind. 444; *Berlin v. Oglesbee*, 65 Ind. 308; *Steeple v. Downing*, 60 Ind. 478; *Hogg v. Link*, 90 Ind. 346.

There are cases which seem to lend some support to the view contended for by the appellant, to the effect that an equitable defence predicated on a mistake in a written instrument, and other defences of a like character, can only be made available as such by an answer or pleading in which affirmative relief is prayed for. *Conger v. Parker*, 29 Ind. 380; *King v. Enterprise Ins. Co.*, 45 Ind. 43, 59.

These cases, while bearing some analogy in principle, are not entirely applicable to the case under consideration. Moreover, it may be doubted whether the construction which was given the statute authorizing equitable defences, in the cases cited, was not too strict to subserve the purposes of the code.

Affirmative relief is attainable by a defendant in all proper cases, and, when desired, it can only be afforded through the medium of an answer or other pleading in the nature of a cross complaint, in which such relief is prayed for. *Orecelius v. Mann*, 84 Ind. 147; *Emily v. Harding*, 53 Ind. 102. But a defendant is not compelled to become an actor, and ask affirmative relief by way of counter-claim. He may rely upon the facts, as an equitable defence, to defeat his adversary's claim.

In respect to the first inquiry, we may say, if the facts upon which the appellee relied had been otherwise available as a defence, they were properly admitted under the general denial.

In respect to the second inquiry, counsel for appellee build an ingenious argument in support of the ruling of the court below in admitting evidence to show a mistake in the deed from the appellant to Adams, upon the ancient common law rule, now embodied in section 1057 of the code, which requires the plaintiff in ejectment to recover on the strength of his own title, and not upon the want of title in the defendant. That the plaintiff in such an action must, as a gen-

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legal title with a present right of possession, title of the defendant, and that the latter, of any imperfection in the title of the defendant, he may, unless estopped, defeat the action by showing outstanding title in a third person with whom the defendant is not connected, are well settled and are general principles.

These principles, however, all come short of the real emergency of the appellee's situation. No outstanding legal title having been made to appear, the question is, can he avail himself of an alleged outstanding equity in favor of an innocent stranger with whom he stands in no sort of legal connection? The outstanding equity in a third person, which would afford shelter for a defendant in possession, without title, against a legal title in the plaintiff, must be such an equity as the defendant would have the right, by making proper parties, to invoke the aid of a court of chancery to enforce in his favor. Unless he is so far connected with the equitable right of a third person, the defendant must leave the parties, between whom the legal and equitable titles subsist, to adjust their rights between themselves.

The doctrine which the authorities support is, that an outstanding title with which the defendant is not connected, and through which he makes no claim, must, in order to be available to protect his possession, appear to be a present subsisting, operative legal title, upon which the owner could sue and recover. *Bennett v. Horr*, 47 Mich. 221; *Shields v. Hunt*, 45 Texas, 424; *McDonald v. Schneider*, 27 Mo. 405; *Sedgwick & Wait Trial of Title to Land*, section 831; *Tyler Eject.*, p. 72.

So far as appears, Adams never set up any claim to the land in controversy under the deed in which the appellee was permitted to show a mistaken description. The grantee in that deed remained for more than twenty years, and still continues, satisfied with the description as it is. Since the appellee claims no right through the deed in question, he is in

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no position to assert a mistake, and seek a correction of the deed, so long as the parties to the instrument are content with the description therein written.

In all cases of mistakes in written instruments, courts of equity will interpose their aid between the original parties, or those claiming under them in privity, but on behalf of persons not thus connected, courts of chancery do not lend their aid. *White v. Wilson*, 6 Blackf. 448 (39 Am. Dec. 437); *Sample v. Rowe*, 24 Ind. 208; *Morris v. Stern*, 80 Ind. 227.

The judgment is reversed with costs, with directions to the court below to sustain the motion for a new trial.

Filed Oct. 27, 1886.

No. 11,610.

McKEEN v. HASKELL ET AL.

EVIDENCE.—*Location of Real Estate may be Shown by Parol.*—It may be proved by parol that certain described real estate is situate within the corporate limits of a city.

TAXES.—*Sale.*—*Action by Purchaser to Enforce Lien.*—*Auditor's Certificate.*—*Deed.*—*Evidence.*—*Personal Property.*—In an action by a purchaser at a tax sale to enforce his lien, the auditor's certificate of the sale and the deed issued are admissible, without first proving that the owner had no personal property.

SAME.—*Omitted Property.*—*Illegal Assessment by Auditor.*—*Copying Void Assessment on Succeeding Duplicate.*—Where an illegal and void special assessment of omitted property, made by the county auditor, is copied by him upon the duplicate of a succeeding year, it is likewise illegal and void for that year.

SAME.—*Interest.*—*Act of March 5th, 1883.*—Under section 3 of the amendatory tax law of March 5th, 1883 (Acts of 1883, p. 96), the purchaser at a tax sale previously made, whose title proves to be invalid and who seeks to enforce his lien, is entitled to interest on the amount of the lien at the rate of twenty per centum per annum from the date of the sale to the date of the decree, and not to the date of payment.

From the Vanderburgh Superior Court.

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A. Iglehart, J. E. Iglehart and E. Taylor, for appellant.

*A. Gilchrist, C. A. DeBruler, C. H. Butterfield, H. A. Mat-
tison, W. F. Smith, R. S. Taylor, R. C. Bell, S. L. Morris, J.
Morris, C. H. Aldrich and J. M. Barrett, for appellees.*

Howk, C. J.—On the 24th day of April, 1883, appellee Haskell commenced this suit against the appellant, McKeen, as sole defendant. In his complaint Haskell alleged that he was the owner in fee simple, and entitled to the possession, of lot No. 166, in that part of the city of Evansville known as Lamasco, in Vanderburgh, county, Indiana, and that McKeen wrongfully and without right detained and kept possession thereof from the plaintiff. Wherefore, etc.

Afterwards, on June 14th, 1883, Haskell filed what is called the second paragraph of his complaint against appellant McKeen, and Charles F. Yeager, auditor, and Thomas P. Britton, treasurer, of Vanderburgh county, as defendants thereto. In this second paragraph Haskell alleged that, on the 17th day of February, 1881, at the public sale by the treasurer of such county, of lots and lands therein, for delinquent State and county taxes due thereon, he purchased lot or block No. 166 above described, for the sum of \$2,-993.96; that said block 166 had been duly and regularly assessed and properly charged, in the tax duplicate of such county for the year 1880 and previous years, in the name of appellant McKeen, with taxes amounting at the date of such sale to the sum aforesaid, being the amount of delinquent taxes then due upon such block 166 from appellant McKeen, the then owner thereof, and the whole of such block being the least amount thereof that any person at such sale offered to take and pay such delinquent taxes; that upon such sale, a certificate thereof as provided by law was executed by the auditor of such county to appellee Haskell; that said block No. 166 not having been redeemed from such sale within the time required by law, a deed thereof was, on the 18th day of April, 1883, duly executed to appellee Haskell by the de-

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defendant Yeager, the auditor of such county, a copy of which deed was therewith filed; that by such deed appellee Haskell became seized of a good and valid title, in fee simple, to such block No. 166, and was then the owner thereof in fee simple; that appellant McKeen claimed to own such real estate in fee or to have some other interest therein, and wrongfully asserted title thereto in himself, and pretended, among other things, that the sale for such taxes was illegal, for the reason that some portion of the taxes, for which such real estate was so sold to appellee Haskell, was not assessed against such real estate; that all of such taxes were legally assessed, but that if any portion thereof should prove to have been not so assessed, then appellee Haskell was entitled to have such portion of the purchase-money with interest from the defendant Britton, treasurer of such county, upon the order of defendant Yeager, auditor of such county. Wherefore, etc.

The cause was put at issue as to all the defendants, and submitted to the court for final hearing, and the court found that the tax sale and deed to appellee Haskell were ineffectual to convey to him the title to said block No. 166, that the amount of the legal taxes and all lawful charges thereon, due on such real estate at the time of the tax sale thereof, was the sum of \$2,050.48, which was included in the sum of \$2,993.66 for which Haskell purchased the real estate at such tax sale, that there were also included in this latter sum the taxes on such real estate for the years 1871, 1872 and 1873, which taxes, with the penalties and interest thereon, amounting in the aggregate to the sum of \$943.18, were illegally assessed, and such real estate was not bound therefor, at the time of the tax sale thereof to appellee Haskell, that the lien of the State on such real estate, for the aforesaid sum of \$2,050.48, was transferred by such tax deed to appellee Haskell, and that he was entitled to recover this latter sum, with interest thereon at the rate of twenty per centum per annum from the 14th day of February, 1881, to be enforced against the above described real estate in the manner provided by

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law ; and as to the residue of his purchase-money, to wit, the sum of \$943.18, the court further found that appellee Haskell was entitled to be paid the same, with interest at the rate of six per centum per annum, out of the treasury of Vanderburgh county.

The court rendered a judgment and decree upon and in accordance with its finding. The separate motions of Haskell, McKeen, of the county auditor, and county treasurer, for a new trial, were overruled by the court. McKeen alone has appealed, but errors are separately assigned here by each of the parties to the record.

The questions discussed by McKeen's counsel are such as arise under the alleged error of the superior court in overruling his motion for a new trial. We will consider and decide these questions in the order in which counsel have presented them, in their well considered brief of this cause.

1. It is claimed on behalf of McKeen, that the trial court erred in permitting appellee Haskell to prove by parol evidence that lot or block No. 166, in Lamasco, was within the corporate limits of the city of Evansville. Certainly, there was no error in the admission of this evidence. Any witness, who was cognizant of the fact, was competent to testify in relation to the location of the lot or block in question, whether in the city of Evansville, in the county of Vanderburgh, or in the State of Indiana; and his testimony upon either point was or would have been competent and admissible, even though there were or might have been written or record evidence of such fact.

2. McKeen's counsel insist in argument that the trial court erred in admitting in evidence the auditor's certificate of the tax sale and the tax deed to Haskell, and certain entries from the tax duplicate. The grounds of objection, urged below to the admission of this evidence, were, that the proper foundation had not been laid by proof for the introduction of such evidence, that it did not appear that the owner of the real estate had no personalty, nor that any search had been made

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for personal property. These and divers other reasons were urged against the admission of the evidence objected to, some and, perhaps, all of which would have had much force if the only question to be tried and determined by the court had been whether or not the tax sale and deed to Haskell were effectual to invest him with an absolute title, in fee simple, to the lot or block sold and described in such deed. This was not, however, the only nor, indeed, the principal question to be tried and determined by the court, in the case in hand. Under the provisions of our statutes concerning taxation applicable to the issues in this action (Acts of 1883, p. 96, section 3), "If any conveyance made by the county auditor pursuant to a sale made for the non-payment of taxes, under this or any former tax law, shall prove to be invalid or ineffectual to convey title for any cause whatever," as such conveyances almost invariably do for *some* cause, and as the conveyance to Haskell did in this case, the lien which the State had on the land described in such conveyance, for State, county and township taxes, for which the land was sold, is transferred by such deed to and vested in the grantee therein; and it is made the duty of the court to ascertain the amount due such grantee, on account of such taxes and interest thereon, and to decree the collection thereof by the enforcement of such lien. We need not argue, for the purpose of showing that the evidence objected to was clearly competent, if not, indeed, indispensable, to enable the court to ascertain the amount due the grantee and the particular land, whereon the lien of the State was transferred to and vested in him, as a security for such amount, by force of the statute.

3. McKeen's counsel say: "The *seventh, eighth and ninth* causes for a new trial assign excessive damages, and, in discussing this subject, two questions arise, namely: The validity of the assessment of a portion of the taxes, and (2) the rate of interest allowed upon the lien, if the plaintiff established one for any cause."

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These two questions present the substantial grounds of difference between the superior court and appellant's learned counsel, in the case under consideration. We will consider and decide the point at issue between court and counsel, in regard to these two questions, in the order in which counsel have stated them.

(1.) As to the validity of the assessment of a portion of the taxes, the trial court decided, as we have seen, that the assessments of taxes on appellant's lot or block for the years 1871, 1872 and 1873, were illegal, invalid and void. To this decision appellant's counsel object only upon the ground that the court ought to have gone further and to have held that the assessment of taxes on such lot or block, for the year 1874, was also illegal, invalid and void. Counsel concede that the assessments of taxes on such lot or block, for the year 1875 and subsequent years, were regular, legal and valid; so that, as to the validity of the assessments, the difference between court and counsel is limited to the assessment for the year 1874. In reference to the assessments of such lot or block, for the years 1871, 1872, 1873 and 1874, the uncontradicted evidence, appearing in the record, was substantially as follows:

August Brauns, a witness for appellant, testified: "I was deputy auditor of Vanderburgh county in 1873 and 1874. The special assessments on lot 166, Lamasco City, were made by me acting for the auditor. They are in my handwriting. No notice of the assessments was given by me to McKeen; I can't tell if any notice was given him. I made the assessments and gave them to the county treasurer, who entered them on the duplicate. I left the auditor's office August 24th, 1874. The tax duplicates were made under my direction; the description of property therein was generally begun, to the best of my recollection, in the spring. I directed the names and work to be done, and the same consequently was done under my direction. If not quite done when I left, on August 24th, 1874, the list was completed beyond

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the letters M and McK. The duplicate of 1874 was taken or copied from the old one of 1873. It got there from the tax duplicate of 1873, where it was put by special assessment. I made no other assessment, except the back assessment, upon the back-assessment record, which is in my handwriting. This back assessment, upon the duplicate of 1873, was copied by the auditor's clerks upon the duplicate of 1874, and this is the only way it got on the duplicate of 1874, for taxes."

William Warren, a witness for appellant, testified as follows: "I was treasurer of Vanderburgh county in 1873 and 1874. I made no assessment for taxes on lot No. 166, Lamasco City, for either of those years. The assessments were made and furnished to me by the auditor, and I put them on the duplicate. No notice was given by me, as I remember, of the assessments to defendant McKeen. The assessments I refer to are the back assessments for the years 1871, 1872 and 1873, made by the auditor. The two certificates of back assessments on said block 166 were handed me by the auditor. Immediately on receipt of such certificates, I made the entry of such back-assessments upon the treasurer's duplicate for 1873, in the back part of such duplicate, out of the alphabetical order in which it belonged."

Appellant also put in evidence the written assessments of such lot or block No. 166, made by the auditor of Vanderburgh county, and referred to in the testimony above quoted of the witnesses Brauns and Warren. These assessments were shown to have been made as aforesaid, on the 28th day of March, 1874, for the previous years 1871, 1872 and 1873. At the time these assessments were so made by the county auditor, the law of this State, authorizing and regulating the special assessment of omitted property for the purposes of taxation, was the assessment law of December 21st, 1872. Acts of 1872, p. 57, *et seq.*; 1 R. S. 1876, p. 72, *et seq.* The provisions of this law, for the special assessment of omitted property, have often been examined and considered by this

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court. *Vogel v. Vogler*, 78 Ind. 353; *State, ex rel., v. Howard*, 80 Ind. 466; *Stockman v. Robbins*, 80 Ind. 195; *Scott v. Town of Knightstown*, 84 Ind. 108; *Hamilton v. Amsden*, 88 Ind. 304; *Board, etc., v. Murphy*, 100 Ind. 570; *Lang v. Clapp*, 103 Ind. 17.

In the case last cited, after referring to our previous decisions, it is said: "It will be seen from the cases cited that it has been uniformly held by this court that special assessments of omitted property by the county auditor or county treasurer, except for the current year, were not authorized by any of the provisions of the assessment law of December 21st, 1872, or of any of its amendments." Adhering, as we must, to the doctrine of the cases cited upon the point under consideration, it is certain, we think, that the special assessments of appellant's lot or block, made by the auditor of Vanderburgh county in 1874, for the years 1871, 1872 and 1873, and not for the then current year, were, as the trial court correctly held them to be, illegal, invalid and void. This being so, it is difficult, if not impossible, to understand upon what ground the decision of the superior court, that appellant's lot or block was liable for the taxes charged against it for the year 1874, with penalties and interest thereon, can be rested or sustained. The evidence conclusively shows that there was no legal or valid assessment of such lot or block in the year 1874 for the purposes of taxation; for, surely, it can not be successfully claimed that the mere act of the auditor's clerks, in copying from the duplicate of 1873 the illegal and void assessment made by such auditor for previous years, made or constituted a legal and valid assessment of such lot or block for taxation purposes for the year 1874. We are of opinion, therefore, that the damages assessed by the trial court, in favor of appellee Haskell, were excessive to the extent of the amount allowed him for the taxes charged against appellant's lot or block for the year 1874, with the penalties and interest thereon, and that,

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for this cause, appellant's motion for a new trial ought to have been sustained.

(2.) As to the second ground upon which appellant's counsel claim, in argument, that the damages assessed were excessive, namely, as to the rate of interest allowed upon the amount of appellee's tax lien, we think that the argument of counsel is unsound and can not be sustained. In this connection we may properly consider and pass upon the only ground not considered and decided in what we have already said, upon which appellee Haskell moved the court below for a new trial, namely, that the court erred in assessing the amount of his recovery in this, that it ought to have allowed him interest on the amount of his tax lien, at the rate of twenty-five per cent. per annum from the 14th day of February, 1881, to the date of payment instead of to the date of the decree. The court allowed appellee, as we have seen, interest at the rate of twenty per cent., from the day last named to the date of the decree. Appellant's counsel claim that the court erred in allowing appellee any higher rate of interest than six per cent. per annum. The learned counsel of appellee Haskell, as well as those of appellant, base their respective claims in relation to the rate of interest to be allowed, upon the provisions of certain sections of the assessment law of December 21st, 1872. It is unnecessary for us to consider these conflicting claims of counsel in relation to the rate of interest appellee Haskell is entitled to recover on his tax lien, because it is settled by our decisions that the rate of interest to be recovered, in such a suit as this, is fixed and governed by the provisions of section 3, above referred to, of the amendatory tax law of March 5th, 1883, which were in force before the commencement of this action, and are still in force. *Flinn v. Parsons*, 60 Ind. 573; *Peckham v. Milikan*, 99 Ind. 352; *Helms v. Wagner*, 102 Ind. 385.

In such section 3 of such amendatory tax law (Acts of 1883, p. 96), it is provided that if any tax deed, "under this or any other law," shall prove to be invalid or ineffectual to

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convey title, "for any cause whatever," the lien of the State upon the land described in such deed shall be transferred to and vested in the grantee therein, "who shall be entitled to recover from the owner of such lands the amount of such legal taxes, together with all lawful charges, with interest at the rate of twenty per cent. per annum from the date of such sales, and also the amount of all subsequent taxes paid, with like interest," etc. It is clear from these statutory provisions that the superior court did not err in regard to the rate of interest allowed appellee in this case, from the date of the sale until the time of the rendition of the decree, which is all that the statute contemplates or provides for.

We have now considered and decided all the questions presented and discussed by counsel of appellant and of appellee Haskell.

Errors have also been assigned by the county auditor and county treasurer, but these errors have not been discussed here, and we do not consider them. The superior court erred, we think, in overruling appellant's motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded for a new trial and for further proceedings not inconsistent with this opinion.

Filed Oct. 27, 1886.

No. 12,771.

BENSON v. BALDWIN ET AL.

BILL OF EXCEPTIONS.—*Order Granting Time to File After Term Must Appear in Record.*—The order granting time to file a bill of exceptions after the term must be made during the term, and it must appear in the order-book. It is not sufficient that it appears as a recital in the bill of exceptions.

From the Harrison Circuit Court.

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 McKee *et al.* v. Gould *et al.*

B. P. Douglass and S. M. Stockslager, for appellant.
W. N. Tracewell and R. J. Tracewell, for appellees.

ELLIOTT, J.—It is necessary to a decision of the questions discussed by the appellant, that the evidence should appear in the record, for, without the evidence, they are not properly presented. The appellee's counsel stoutly insist that the evidence is not in the record, for the reason that the bill of exceptions was filed after the term, and it does not appear, except in the bill itself, that leave was given to file the bill after the close of the term. The position assumed by appellee's counsel is correct. It is quite well settled that the order granting time to file a bill after term must be made during term, and that it must appear in the order book. It is not sufficient that it appears as a recital in the bill of exceptions.

Judgment affirmed.

Filed Oct. 27, 1886.

No. 12,187.

McKEE ET AL. v. GOULD ET AL.

HIGHWAY.—*Report of Viewers Against Utility.*—*No Appeal from Order Confirming.*—An appeal will not lie to the circuit court from an order of the board of county commissioners confirming the report of the first viewers that a proposed highway will not be of public utility.

SAME.—*Remedy.*—*Second Petition.*—The remedy of the petitioners when an adverse report is made upon the subject of the utility of a highway is to file a bond for costs and petition over.

From the Clinton Circuit Court.

W. R. Moore, T. H. Palmer and W. F. Palmer, for appellants.

J. V. Kent, O. E. Brumbaugh and J. W. Merritt, for appellees.

MITCHELL, J.—At the September session, 1883, John Gould, and eighteen others, petitioned the board of commis-

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sioners of Clinton county, for the location of a highway on a route which is described in the petition. Viewers were duly appointed, who, at a subsequent session of the board, returned their warrant of appointment, with the report that they had executed the mandate contained in the warrant, and had found the proposed highway therein described not to be of public utility.

Thereupon the board accepted and confirmed the report, adjudged that the highway would not be of public utility, and taxed the costs against the petitioners. An appeal bond was then filed, in which it is recited that the persons signing the bond had appealed to the Clinton Circuit Court, from an order of the board of commissioners, refusing to grant their petition for a highway. The bond was signed by John Gould, Foster Hind, Joseph B. McKee, "Surety," John W. Jacobs and James Stinson. The proceedings were thereupon certified by the county auditor to the Clinton Circuit Court.

On the commissioners' record the proceedings were entitled, "In matter of the petition for a public highway, by John Gould et al." Upon being removed to the circuit court the case was docketed, "John Gould, Foster Hind et al. v. Joseph B. McKee, Mary A. Smoot et al." Substantially under that title the case was continued through several terms until it was finally disposed of in the court below.

When, or in what manner, or for what purpose, Joseph B. McKee and Mary A. Smoot, or any one else, except the petitioners, became parties to the proceeding, the record does not disclose. McKee signed the appeal bond adding "surety" after his name, while the name "Mary A. Smoot" appears among those petitioning for the location of the highway.

The first record entry in the circuit court recites that the defendants moved the court to dismiss the appeal, alleging, among other grounds, that the court had no jurisdiction over the subject-matter. This motion was overruled. Thereupon, without any pleading, remonstrance, or other issue, except such as may have arisen upon the proceedings heretofore re-

cited before the board of commissioners, a jury was empanelled and sworn to try the issues joined. Testimony was therefore taken covering six hundred pages upon the subject of the utility and inutility of the proposed highway. After argument of counsel and instructions from the court, the jury returned that the proposed highway would be of public utility.

Over a motion for a new trial, judgment was entered that the highway, as described in the petition, would be of public utility, and an order was made remanding the proceedings back and requiring the board of commissioners to carry out the finding of the jury and the judgment of the court thereon.

The defendants moved the court to modify its order, by directing particularly and specifically what course should be pursued by the commissioners when the matter should be certified back to them. This motion was overruled.

The question is now presented, whether in case the viewers appointed in a proceeding for the location of a highway report that the proposed highway would not be of public utility, and refuse to lay out and mark the same as provided in section 5016, R. S. 1881, the location of the highway may nevertheless be coerced by an appeal to the circuit court from the order of the board confirming the report of the viewers.

Under section 5015, upon the presentation of a proper petition signed by the requisite number of freeholders, and proof of due notice thereof, it becomes the duty of the board to appoint three persons to view the proposed highway. The commissioners have no discretion. Having ascertained that the petition is in due form and properly signed, and that the prescribed notice has been given, it becomes their duty to appoint viewers. The viewers appointed and notified, having taken an oath as the statute provides, are required to proceed to view the highway, and if they shall deem it to be of public utility, it is their duty to lay out and mark the same on the best ground, not running through any person's enclosure of one year's standing without his consent, unless

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upon examination, a good way can not otherwise be had. At the next ensuing session of the board, the viewers or a majority of them are required to make a report of their proceedings, giving a full description of the highway as located by metes and bounds. Section 5017. If no objection be made, the board shall cause a record of the highway to be made, and order the same to be opened and kept in repair.

Sections 5019, 5020 and 5021 provide for remonstrances by aggrieved persons through whose lands the proposed highway may pass, and for the appointment of reviewers to assess, and for the assessment and payment of damages, out of the county treasury, provided the board shall consider the highway of sufficient importance to the public to justify them in ordering such payment to be made.

Section 5023 enacts that any freeholder of the county may, at any time before final action by the board, object that the highway is not of public utility. Other viewers are then to be appointed, who are required to examine the proposed highway, and report whether or not in their opinion it will be of public utility. If a majority of these last named viewers report against the public utility of the highway, section 5024 provides that "the same shall not be established."

From this brief summary of the law regulating proceedings for the location of a highway, it will be seen that no provision whatever is made for any objection, remonstrance or contest, in case the first viewers report against the public utility of a proposed highway.

The statute seems to contemplate, that after the appointment of the first viewers, a report from them in favor of the public utility of the highway, and that they have laid out and marked the same as provided in section 5017, is a condition precedent to any further proceedings in the location of a highway. If the report of the first viewers is unfavorable, the statute contains no intimation that anything further may be done, except that section 5026 provides that when viewers shall have reported against the public utility of a proposed

highway, no second or subsequent petition shall be acted upon by the board unless the petitioners shall first file a bond conditioned for the payment of all costs, in case other viewers to be appointed shall make like report. The inference which we draw is, that the only remedy petitioners may resort to when an adverse report is made upon the subject of the utility of a highway petitioned for, is to file their bond for costs and petition over again. That they may not appeal to the circuit court, and ask that tribunal to coerce the location of a highway, over the report of viewers against its public utility, seems to result from several considerations :

1. Up to the point where the first viewers report adversely, and until a remonstrance or objection is presented, the proceedings before the board are *ex parte*. Persons may appear and object to the petition, the sufficiency of the notice, the competency of the viewers, and the like, but, as was said in *Green v. Elliott*, 86 Ind. 53, "There are no adversary proceedings and no issues, until some one has appeared and made them."

The settled rule is that nothing can be tried on appeal from the board of commissioners to the circuit court, except such matters as were in issue before the board. *Forsythe v. Kreuter*, 100 Ind. 27; *Green v. Elliott*, *supra*; *Schmied v. Keeney*, 72 Ind. 309.

If, as in this case, no one has appeared and presented any objection before the board, the proceeding upon appeal to the circuit court is of necessity *ex parte*, without issue or adverse parties. The petitioners could not make it otherwise by the form in which they caused the proceeding to be docketed in the circuit court. The record disclosed that there was nothing before the court to try, and the proceeding should have been summarily dismissed.

2. Where viewers, as in the case we are considering, have reported against the public utility of a highway, and the board of commissioners have, as they were required to do, confirmed the report and proceeded no further, an appeal and

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trial in the circuit court would be manifestly fruitless. The only persons under the law, authorized to lay out and describe the location of a proposed highway, are the viewers to be appointed by the board of commissioners. If the first viewers do not do this, no subsequent viewers or other body have the power. The law commits this to the viewers so appointed, and to no one else. *Hughes v. Sellers*, 34 Ind. 337; *Suits v. Murdock*, 63 Ind. 73.

Until this is done it is not within the power of the board of commissioners or the circuit court to adjudge that a highway be opened and established. *Hughes v. Sellers, supra.* These viewers can only be required to lay out and mark the proposed highway, in the event they deem it of public utility. Any viewers whom the board of commissioners might appoint, in obedience to the command of the circuit court, must act on their own judgment, and would not be bound by the finding and judgment of the court in respect to the public utility of the highway. Besides, even if the first viewers should, in obedience to the finding and judgment of the court, report in favor of the public utility of the highway and lay it out, any freeholder of the county has the right, at any time before final action of the board, to come in under section 5023 and object to the public utility of the road. Other viewers must then be appointed. If a majority of these report against its public utility, the statute is mandatory that "the same shall not be established."

The statutes indicate the legislative policy plainly enough. A public highway can not be located and established in any case by petition and notice, without first securing a report favorable to its utility, and having it laid out by viewers duly appointed in that behalf. Since the circuit court had before it, in this case, nothing in the nature of an issue raised before the board to try, and no adverse parties, the record presented no subject-matter over which it acquired jurisdiction. Moreover, as the only persons or tribunal authorized by the statute to determine in the first instance, whether or

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not the proposed highway was of public utility, had decided against its utility, and declined on that account to lay it out, both the board of commissioners and the circuit court were thereafter powerless to locate and establish a highway on that route, until another petition should have been presented to the board, and a report of viewers favorable to such location had been secured.

It must be held, therefore, that until highway proceedings have progressed so far as that a final order or decision is made by the board of commissioners, after a report of viewers has been received, which determines that the proposed road is of public utility, and in which the road is laid out and described, no appeal will lie. *Freshour v. Logansport, etc., T. P. Co.*, 104 Ind. 463. This conclusion leads to the reversal of the judgment.

Judgment reversed, with costs.

Filed Oct. 28, 1886.

No. 12,636.

THE TERRE HAUTE AND LOGANSPORT RAILROAD COMPANY v. BISSELL.

RAILROAD.—Obstruction of Street in City.—Action for Damages by Abutting Lot-Owner.—Pleading.—An abutting lot-owner can not maintain an action against a railroad company for constructing and operating its railroad upon the street of a city, where the injuries complained of are such only as he sustains in common with the public generally; and a complaint which fails to allege special injury to the plaintiff, or that such use and occupation of the street are without leave of the city, is insufficient.

BILL OF EXCEPTIONS.—Time of Filing.—Statute Construed.—Where a bill of exceptions was presented to the judge for his signature within the time allowed by the court, but was not in fact signed and filed for nearly a month after the expiration of the time allowed, it is properly a part of the record on appeal, under section 629, R. S. 1881.

From the Marshall Circuit Court.

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J. G. Williams, for appellant.

J. D. McLaren, M. A. O. Packard and O. M. Packard,
for appellee.

Howk, C. J.—Errors are assigned here by appellant, the defendant below, calling in question the decisions of the circuit court in overruling (1) its demurrer to the first paragraph of appellee's complaint, (2) its demurrer to the second paragraph of such complaint, and (3) its motion for a new trial.

This suit was commenced on the 29th day of September, 1884. In the first paragraph of his complaint appellee alleged that he then was, and for five years last past had been, the owner in fee simple of lots numbered from 11 to 18, both inclusive, in Wilson's subdivision of out-lot No. 18, in Merrill's addition to the city of Plymouth, in Marshall county; that such lots abutted on a public street of such city, known as First street, sixty feet wide, for the distance of — hundred feet along the west line of such street; that, as the owner of such lots, appellee was also the owner in fee simple of the west thirty feet of such street immediately in front of his lots, extending from the front line of such lots to the center or middle line of such street; that, during such five years, appellee had made valuable and lasting improvements, of the value of \$5,000, on such lots, in the erection of a dwelling-house wherein he and his family resided; that within the last two years ingress and egress to and from appellee's lots, and his residence and other buildings thereon, had been obstructed and prevented on the east side thereof by two railroad tracks constructed upon and along said street, and in constant use by appellant, in moving and transporting its cars and locomotives on and along such tracks on said street, in front of and near to appellee's lots and residence; that by the construction and constant use of such railroad tracks on said street in front of and near to appellee's residence property, appellant had caused such an obstruction to the free use

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of said property as essentially to interfere with the comfortable enjoyment of life therein, and the emission of large volumes of smoke, cinders, dust and other offensive matter from appellant's locomotives, which were constantly moving over said tracks, was offensive to appellee and his family; that, within two years last past, appellant unlawfully and without right, and without having first caused appellee's damages to be assessed and tendered to him, and without his consent, entered upon and laid down two railroad tracks on that portion of said street lying in front or on the east side of appellee's said lots, and maintained and used such tracks for the passage of locomotives and cars thereon, and all without his consent.

The second paragraph of the complaint does not differ materially from the first paragraph, in its statement of the facts constituting appellee's supposed cause of action against the appellant.

To each of the paragraphs of appellee's complaint appellant's demurrer, for the alleged insufficiency of the facts therein to constitute a cause of action, was overruled by the court.

It is earnestly contended by appellant's learned counsel, that the court below erred in each of these rulings. It will be observed that while appellee carefully alleged that he was the owner in fee simple of the west half of First street, in the city of Plymouth, extending from the front or east line of his lots eastwardly thirty feet to the middle or center line of such street, yet he nowhere averred, in either paragraph of his complaint, that, in the construction and use of its two railroad tracks on such street, appellant had entered upon, occupied or used, by either of such tracks, that part of such street of which he claimed to be such owner. For the want of such an averment, appellant's counsel earnestly insist that each paragraph of appellee's complaint was insufficient to withstand its demurrer thereto.

This objection seems to be well taken, as to each paragraph

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of the complaint. It must be assumed, in the absence of any averment to the contrary, that appellant had entered upon and laid down its two railroad tracks within the limits of First street, with the consent and permission of the common council of the city of Plymouth. If such city was incorporated under the general law of this State, for the incorporation of cities, as we must assume it was in the absence of any showing to the contrary, by the express provisions of that law, section 3161, R. S. 1881, in force since March 14th, 1867, its common council had exclusive power over its streets, alleys and highways. It is settled by our decisions, that the power of a city, incorporated under our general laws for the incorporation of cities, over its streets and alleys, includes or extends to many other uses than those of ordinary travel on public highways. Thus, in *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178, it is said: "So far as the highway, street, or easement is concerned, as the municipality has complete control thereof, it may, we presume, make or authorize any use of the street which will not essentially change and divert it from its intended use as a public highway." But this power of the common council of a city, over a street as a highway, can not, of course, affect the rights of the individual owner of the fee in the soil, over which the highway or street passes. "This right of the individual, according to the case of *Protzman v. Indianapolis, etc., R. R. Co.*, 9 Ind. 467, 'is as much property as the lot itself.' As was said in *The Common Council, etc., v. Croas*, 7 Ind. 9, it is a 'right distinct from the claim of the public, which even the Legislature could not take away, unless to appropriate to a public use.' In which case, of course, compensation must be made." *City of Logansport v. Shirk*, 88 Ind. 563; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486.

Conceding, in the case in hand, that appellee was the owner in fee simple of First street, in the city of Plymouth, from the eastern or front line of such lots to the middle line of such street, we can not presume in the absence of averment

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to that effect, in aid of the averments of appellee's complaint, that in the construction of its two railroad tracks, or in its use thereof by the passage over the same of its cars and locomotives, within the limits of First street, appellant had entered upon, occupied or used that part of such street, owned in fee simple by the appellee. The grievances of which appellee complained were not shown, by the allegations of either paragraph of his complaint, to be injurious to that part of First street, whereof he claimed to be the owner in fee simple. In the absence of any showing that the tracks of appellant's railroad were located, constructed and used on and over that part of First street, of which appellee claimed to be the owner in fee, the grievances whereof he complained, caused or occasioned by the occupation and use of First street for railroad purposes, were such incidental injuries merely as he sustained in common with the public, and not different in degree or character from those sustained by the public generally. For such injuries appellee can not maintain an action against the appellant. *McCowan v. Whitesides*, 31 Ind. 235; *Cummins v. City of Seymour*, 79 Ind. 491 (41 Am. R. 618); *Matlock v. Hawkins*, 92 Ind. 225; *Dwenger v. Chicago, etc., R. W. Co.*, 98 Ind. 153.

We are of opinion, therefore, that the trial court erred in overruling appellant's demurrer to each paragraph of appellee's complaint.

Under the alleged error of the court, in overruling the motion for a new trial, it is claimed by appellant's counsel that the court clearly erred in giving the jury, at appellee's request, a certain instruction. The point is made by appellee's counsel, and is relied upon apparently with much confidence, that the bill of exceptions, containing the evidence on the trial and the instructions given and refused by the court, was not filed within the time granted, and, therefore, is not properly a part of the record. It is shown by the transcript before us, that the motion for a new trial was overruled and judgment rendered on the 4th day of April, 1885, and ap-

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pellant was then given sixty days from that day "to present its bill of exceptions herein to the honorable judge of the Marshall Circuit Court;" that within such sixty days, to wit, on the first day of June, 1885, appellant presented its bill of exceptions to the judge aforesaid; that thereafter, on the 30th day of June, 1885, such bill was "signed, sealed and made part of the record herein," by the judge of such court; and that on the next day, to wit, July 1st, 1885, such bill of exceptions, signed and sealed as aforesaid, was duly filed in the court below.

It will be seen from the foregoing abstract of the record, that while appellant's bill of exceptions was prepared and presented to the judge below, for his signature, within the sixty days allowed by the court, yet it was not in fact signed by such judge and filed until nearly one month after the expiration of such sixty days. Under the provisions of section 346 of the civil code of 1852, and the rules of practice founded thereon, it is very clear that the bill of exceptions, so signed and filed, would have constituted no proper part of the record of this cause, on an appeal to this court. *Dunn v. Hubble*, 81 Ind. 489.

But the civil code of 1881 made a radical change in the practice theretofore existing, in relation to bills of exceptions, in so far, at least, as the filing thereof is concerned. In section 629, R. S. 1881, which is section 406 of the civil code of 1881, it is provided in effect that when the record does not otherwise show the decision excepted to, or the grounds of objection thereto, "the party objecting must, within such time as may be allowed, present to the judge a proper bill of exceptions, which, if true, he shall promptly sign and cause it to be filed in the cause; if not true, the judge shall correct, sign, and cause it to be filed without delay." It is also provided that "The date of the presentation shall be stated in the bill of exceptions," and further that "delay of the judge in signing and filing the same shall not deprive the party objecting of the benefit thereof." Under these provisions of

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the code of 1881, all that the "party objecting" is required to do is to present to the judge his proper bill of exceptions within the time allowed by the court. When this has been done by the objecting party, the judge must sign, or must correct and sign, and must then file such bill of exceptions "without delay," and "when so filed," the statute says, "it shall be a part of the record." It is expressly declared, in terms so plain that they can not possibly be misunderstood, that "delay of the judge," in signing and filing such bill of exceptions, "shall not deprive the party objecting of the benefit thereof."

In *Creamer v. Sirp*, 91 Ind. 366, it was held in effect that when time is allowed within which to prepare and present a bill of exceptions, and it is shown by such bill that it was presented to the judge within the time allowed, the bill of exceptions will, under the provisions of section 629, R. S. 1881, constitute a proper part of the record, on an appeal to this court, although it may not have been filed until after the expiration of the time allowed. So, it was held, also, in *Hamm v. Romine*, 98 Ind. 77.

In support of their position appellee's counsel cite and rely upon *La Rose v. Logansport Nat'l Bank*, 102 Ind. 332; but what was there said, in seeming conflict with our previous cases and what we here decide, was subsequently explained and modified in the recent case of *Robinson v. Anderson*, 106 Ind. 152. Where it is shown by the bill of exceptions that it was presented to the judge, for his signature, *within* the time allowed by the court, and the record shows that such bill has been filed either *before* or *after* the expiration of such time, under the provisions of section 629, *supra*, such bill of exceptions will constitute a proper part of the record of the cause on an appeal to this court. "When so filed, it shall be a part of the record," is the language of the statute. *Louisville, etc., R. W. Co. v. Harrigan*, 94 Ind. 245; *Pratt v. Allen*, 95 Ind. 404; *Shulse v. McWilliams*, 104 Ind. 512.

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In the case in hand, as we have seen, the date of the presentation of the bill of exceptions, as stated therein, was within the time allowed by the court; and it was shown by the record that such bill of exceptions was duly filed in the court below, on the 1st day of July, 1885. It follows, therefore, from what we have said, that the bill of exceptions, containing the evidence and the instructions given and refused, constituted a proper part of the record before us on this appeal.

We have said thus much upon the question of practice presented, because appellee's counsel have seemed to rely with implicit confidence, in argument, upon the point that the bill of exceptions is not properly a part of the record of this cause, and not because we have deemed it either necessary or proper for us to consider and decide now the question, whether or not the trial court erred in giving the jury, at appellee's request, the instruction claimed by appellant's counsel to have been erroneous.

Our conclusion in relation to the insufficiency of each paragraph of appellee's complaint requires the reversal of the judgment below, and renders it unnecessary for us now to consider or decide any of the questions arising under the alleged error of the court in overruling appellant's motion for a new trial herein.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrers to each paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

Filed Oct. 26, 1886.

Peters et al. v. Griffie et al.

No. 12,778.

PETERS ET AL. v. GRIFFIE ET AL.

DRAINAGE.—Notice.—Acquiescence in Validity of Proceedings.—Estoppel.—

Where, in giving notice in a drainage proceeding, there is an attempt to comply with the statute, and some notice is given, though insufficient, parties who have actual knowledge of the petition and the proceedings under it, and that money has been expended on the faith that the proceedings are valid, and make no objection, will be presumed to have acquiesced in their validity, and can not afterwards move to dismiss for want of notice. *Vizard v. Taylor*, 97 Ind. 90, distinguished.

From the Madison Circuit Court.

C. L. Henry, H. C. Ryan and G. M. Ballard, for appellants.*E. P. Schlater, M. S. Robinson and J. W. Lovett*, for appellees.

ELLIOTT, J.—The petition of the appellants for a ditch was filed on the 18th day of March, 1884, and, on the 7th day of the following April, was docketed and referred to the drainage commissioners. On the second day of June of that year, the report of the commissioners was filed, and on the first day of September following, the appellees moved to dismiss the proceedings. To this motion the appellants filed an answer alleging, in substance, that, on the 11th day of March, 1884, the petitioners posted notices in three of the most public places in the county; that, on the 18th day of that month, they filed their petition, and noted thereon the 1st day of April as the time for hearing it; that, on that day, the petitioners appeared, and, as the answer alleges, "made it appear to the court that notice had been given;" that, no objection being entered, an order was made fixing the time and place for the meeting of the commissioners; that the commissioners made a report which was approved; that the contract for constructing the ditch was let to Charles McKee and others; that work was done thereunder to the value of \$2,000, and a great amount of the assessments had been collected prior

108	121
128	76
108	121
130	583
108	121
121	424
108	121
124	588
108	121
138	139
108	121
149	120
108	121
155	488
108	121
162	630
108	121
171	208

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to the filing of appellees' motion. It is further alleged that the appellees had actual notice of the filing of the petition and of the view and inspection of the lands; that they made no objection until after the work had been done and a great part of the assessments collected.

It is quite clear that if the attack made upon the proceedings were a collateral one, the notice would be sufficient to sustain the proceedings. *McMullen v. State, ex rel.*, 105 Ind. 334; *Young v. Sellers*, 106 Ind. 101; *Pickering v. State, etc.*, 106 Ind. 228; *Brosemer v. Kelsey*, 106 Ind. 504. But we can not regard the present attack as a collateral one, for we think an attack by motion filed in the same cause must be deemed a direct one. While we regard the attack as a direct one, still, we are of opinion that the court erred in dismissing the proceedings. There was here notice, although a defective one, of the proceedings, and there was actual knowledge of the filing of the petition and of the proceedings under it, and also knowledge that money was expended on the faith that the proceedings were valid. We think that under these facts it must be held that appellees are not in a condition to defeat the proceedings on the ground that the notice was insufficient. If there had been no attempt at all to comply with the statute as to notice, the case might possibly be different, but here there was an attempt to comply with the statute, and some notice was given. The authorities sustain the doctrine that under such a state of fact as that exhibited in the answer, acquiescence in the validity of the proceedings will be presumed. *Kellogg v. Ely*, 15 Ohio St. 64; *City of Burlington v. Gilbert*, 31 Iowa, 356 (7 Am. R. 143); *Erie R. W. Co. v. Delaware, etc., R. R. Co.*, 21 N. J. Eq. 283; *Thomas v. Woodman*, 23 Kan. 217 (33 Am. R. 156); *Easton v. New York, etc., R. R. Co.*, 24 N. J. Eq. 49; *Traphagen v. Mayor, etc.*, 29 N. J. Eq. 206; *City of Logansport v. Uhl*, 99 Ind. 531, 540 (50 Am. R. 109); *Muncey v. Joest*, 74 Ind. 409, see pp. 413, 414; *Flora v. Cline*, 89 Ind. 208.

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This case is plainly distinguishable from *Vizzard v. Taylor*, 97 Ind. 90, for there the land-owner could not have had notice, for he was not a party to the proceeding.

Judgment reversed.

Filed Oct. 30, 1886.

 No. 12,759.

FAUROTE v. CARR ET AL.

FRAUDULENT CONVEYANCE.—*Exemption from Execution.*—*Debtor and Creditor.*

—*Husband and Wife.*—Where a debtor, having at the time less money and property than he is entitled to under the exemption laws, purchases real estate, which he causes to be conveyed to his wife and children, the conveyance, nothing more appearing, will not be set aside as fraudulent, at the suit of a creditor.

SAME.—*Pension Money.*—Money received by a debtor as a pension from the Federal government stands upon the same footing as any other money which he may have.

From the Steuben Circuit Court.

D. R. Best, E. A. Bratton, C. S. Denny and W. F. Elliott,
for appellant.

MITCHELL, J.—The question involved in this case, which was a suit to set aside a conveyance alleged to have been made in fraud of the rights of creditors, arises on a special finding of facts made by the court below at the appellant's request.

The facts found are, that on the 25th day of February, 1885, William M. Carr was a resident householder of Steuben county, in this State, and that he was indebted to the plaintiff to the amount of \$88.32, which sum, with the interest and attorney's fees, aggregating \$103.14 at the date of the finding, remained unpaid. The total value of all property then owned by him, including wearing apparel, amounted to \$109.

108	123
125	394
126	123
133	500
108	123
135	357
108	123
148	438
108	123
167	647

Faurote v. Carr et al.

The court found further that Carr was, at the date of the purchase hereinafter mentioned, indebted to other persons in various sums, amounting in all, including the sum due the plaintiff, to about \$400. Having previously served in the army, on the 26th of February, 1885, Carr received from the United States government \$1,374.75 pension money. He loaned out of this sum \$150 to persons who were insolvent and worthless, and \$224.75 was expended in various ways for the benefit of himself and family, so that on the 2d day of March following, he had on deposit for his use in the Angola Bank \$1,000.

On the 2d day of March he purchased the real estate described in the complaint, and paid for it out of the money mentioned, \$330, that being the full purchase-price. He also paid all the debts owing by him, except that due the plaintiff. By Carr's direction, the land purchased was conveyed to his wife and minor children, who are parties defendants, and who paid nothing.

The court found that at the time Carr purchased the land and caused it to be conveyed to his wife and children, and from thence to the date of the trial, he was the owner of a less amount of property than would have been allowed him under the exemption laws of the State.

Upon the facts found, the substance of which we have stated, the court stated conclusions of law, to the effect that the plaintiff was not entitled to have the conveyance set aside.

The question for decision involves the propriety of the conclusions of law stated by the court.

In favor of reversal, it is argued with much force and plausibility, that however commendable the motive of the debtor may have been, in causing the conveyance in question to be made as it was, since the effect of the transaction was to deprive the plaintiff of the right to subject the property conveyed to the payment of her debt, the law raises an inevitable inference of fraud, regardless of the purpose of the

Faurote v. Carr *et al.*

debtor, or whether the grantees—they having paid nothing—had notice of the facts, or participated in any improper design or not.

The general proposition, that a voluntary conveyance made by an insolvent debtor, who has at the time not sufficient other property subject to execution to pay all his debts, is constructively fraudulent as against existing creditors, is well sustained by the argument, and fully supported by the authorities cited.

The principle which rules this and other similar cases lies back of the proposition which counsel have maintained.

The court having found that the debtor, at the time he caused the conveyance in question to be made, was not the owner of an amount of property above that which in law he held as exempt from execution, can it be said, that an inference of fraud arises because he donated money or property, which the appellant could not have subjected to the payment of her debt, to his wife and children?

The exemption laws of the State, having been enacted in pursuance of a constitutional mandate, are to be liberally construed in favor of the debtor.

We are unable to see how the rights of a creditor are in any way impaired, in case his debtor in good faith either sells or gives away property which is exempt and beyond the reach of any process which might be invoked for its subjection, even in the hands of the debtor.

It is only where the debtor voluntarily disposes of property which the creditor might have subjected to the payment of his debt, that the law raises an inference of fraud.

Where property is unavailable to creditors and beyond their reach, by reason of its being exempt from execution while the title remains in the debtor, the fact that he makes a *bona fide* sale or gift of it, while in that situation, does not put it more effectually beyond their reach than it was before. Hence creditors sustain no injury, and unless the transaction is merely colorable and tainted with actual fraud, the law

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does not denounce it as fraudulent. *McLean v. Hess*, 106 Ind. 555.

The consideration which this question received in the recent case of *Burdge v. Bolin*, 106 Ind. 175, and the authorities there cited, renders it unnecessary that we should elaborate further. The case of *Williams v. Osborne*, 95 Ind. 347, rightly understood upon its facts, is not opposed to the conclusion here arrived at. It is scarcely necessary to add, that the fact that the money which was paid for the land came from the Government as a pension, cuts no figure in the case. After the money was received by the pensioner, it stood at the same level with any other money which he may have had. *Cavanaugh v. Smith*, 84 Ind. 380.

The judgment is affirmed, with costs.

ELLIOTT, J., did not participate in the decision of this cause.
Filed Oct. 29, 1886.

No. 11,749.

THE VERNON, GREENSBURGH AND RUSHVILLE RAILROAD
COMPANY ET AL. v. JOHNSON.

WITNESS.—*Mileage.—Attendance in Two Causes at Same Time.—Constructive Fees.—Act of February 28th, 1883.*—Where two actions, brought by different parties, are pending against the same defendant, witnesses who are summoned by both plaintiffs and who attend in both causes on the same day, although they travel the distance to and from the place of trial but once, are entitled to mileage fees in each cause. The act of February 28th, 1883 (Acts of 1883, p. 48), in relation to constructive fees, does not apply to the fees and mileage of witnesses.

From the Scott Circuit Court.

A. G. Smith, for appellants.

G. F. Lawrence, for appellee.

Howk, C. J.—In this case the error assigned by appellants,

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upon the overruling of their motion to re-tax certain costs adjudged against them herein, presents the only questions we are required to consider and decide.

The motion was duly verified, and therein it was stated that, after the trial of this cause, and after the adjournment of the court, at the term thereof last preceding the filing of such motion, the clerk of such court, through a misapprehension of the facts and the law, taxed and allowed as part of the costs of this suit certain illegal and constructive mileage fees to certain named witnesses—giving the name of each witness and the amount of the mileage fees claimed and taxed in his favor—amounting in the aggregate to the sum of \$87.60; that all of such sum was taxed against appellants herein, as mileage fees claimed to be due the persons named as witnesses in this suit, and operated as a judgment in favor of appellee and against appellants; that the amounts claimed and taxed as mileage fees, for each of such witnesses, were constructive and illegal, and the services therein charged for were never performed by such witnesses, nor either of them, and the mileage claimed by them, or either of them, was never actually travelled by such witnesses; that during all the time this suit was pending in the court below, there was also pending a certain other suit, wherein one Thomas O. Johnson was plaintiff, and appellants herein were the defendants, which appeared upon the order-book of such court as No. 2359, and that each of the witnesses named was duly summoned as a witness in such suit, on the part of the plaintiff therein, and was also summoned, at the same time, as a witness for appellee in this suit; that each time the witnesses named attended the court below, in the suit No. 2359, they also attended as witnesses for appellee in this suit; that for each day the witnesses named attended in such suit No. 2359, they claimed their attendance and mileage, and were allowed for the same therein, and at the same time they claimed their fees and mileage in this cause as aforesaid, the same in each instance being for the same days' attendance and mileage

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which had been travelled to attend as witnesses in such suit No. 2359; that, in no instance, did the witnesses named, or either of them, attend as such in this suit, when they did not attend in the other suit, and the mileage travelled to attend in this suit was the identical mileage travelled to attend as witnesses in the other suit, and the claim of mileage in this suit, when the same was claimed and allowed in such suit No. 2359, was illegal and constructive, and should be struck out and re-taxed; and that the appellee claimed to own all the mileage fees of the witnesses named, and, if so, the sum stated had accrued to him without any outlay or investment on his part.

We are of opinion that the court committed no error in overruling appellants' motion for the re-taxation of the costs herein. It will be observed from the facts recited in the motion, the substance of which we have given; that the only ground, on which it was claimed that the clerk's taxation of the mileage fees of the witnesses was illegal, was that such fees were constructive. It was not claimed that any of the witnesses had not travelled, "in going and returning from court, from his residence," the requisite number of miles to entitle him, under the law, to the whole amount of mileage fees allowed and taxed by the clerk in his favor. But appellants' claim in this case is, as we understand their motion, that appellee Oradus P. Johnson ought not to be permitted to recover of them the mileage fees of his witnesses, for which he had obtained judgment, because another Johnson, whose Christian name was Thomas O., had another suit against appellants, pending in the same court and at the same time as the appellee's suit, and had summoned therein the same witnesses as his witnesses, who had claimed and been allowed by the clerk, in his suit, the same amount of mileage fees for the self-same travel, in going to and returning from court from their respective residences. We know of no provision of our law which will sustain this claim of the appellants; and it is certain, we think, that it can derive no possible support from our statute

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on the subject of constructive fees, although appellants' motion herein would seem, from its terms, to have been founded on that statute.

The statute referred to was approved February 28th, 1883, and was entitled "An act supplemental to" the fee and salary law of "March 31st, 1879, and to all acts amendatory thereof." In section 3 of that statute, it is provided, in effect, that, "Whenever the acts to which this act is supplemental specifies a fee or sum of money as compensation for any service," etc., "it shall be unlawful to charge, tax up, or receive any further or additional sum under color of any claim or construction of law." One difficulty, at least, with appellants' motion herein and the argument of their counsel, as based upon the provisions of such act of February 28th, 1883 (Acts of 1883, p. 48), is found in the fact that there is no provision whatever, either in the fee and salary law of March 31st, 1879, or any act amendatory thereof, which specifies the fees and mileage of a witness in court. It can not be claimed, therefore, that the provisions of the aforesaid act of February 28th, 1883, in relation to constructive fees, are applicable or were intended to be applied, if it were possible to apply them, to the fees and mileage of a witness in court.

The law now in force, specifying the fees and mileage of witnesses in circuit, superior and criminal courts, is known as section 493, R. S. 1881, and took effect and has been in force since March 3d, 1877, and long before the passage of any of the acts mentioned in the statute, which declares it to be unlawful to charge or receive constructive fees. This fact, also, strongly tends to show that appellants' motion, and the argument of their counsel, can receive no possible support from the provisions of the statute in relation to constructive fees. We have said thus much on this subject in answer to the arguments of counsel and to show, as we think we have shown, that the statute prohibiting the taxation or receipt of constructive fees can have no possible application to the mile-

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age fees, of which appellants complain in their motion herein. Such mileage fees were not, and are not, in any proper or legal sense, as it seems to us, constructive fees within the meaning of our statute.

We conclude, as we began, with the expression of our opinion that no error was committed by the court below in overruling appellants' motion for the re-taxation of the costs herein.

The judgment is affirmed, with costs.

Filed Oct. 15, 1886.

108 130
127 573
108 130
128 64

 No. 12,784.

MCCASLAND v. THE ÆTNA LIFE INSURANCE COMPANY.

DEED.—Mistake.—Reformation.—Question of Fact.—Where a mistake in describing land intended to be conveyed is as to the identity of the land, it is a mistake of fact and not of law.

SAME.—Representation as to Description.—Pointing Out Land.—Where a party points out a specific parcel of land to another and represents that it is described in a particular way, the latter has a right to rely on the statement.

MORTGAGE.—Mistake.—Reformation.—Foreclosure.—Where a mistake in the description of mortgaged land is carried into the decree of foreclosure, it may be corrected by reforming and reforeclosing the mortgage.

CONTRACT.—Consideration.—Agreement not to Sue for Reformation of Mortgage.—A promise, made upon an agreement not to sue for a reformation and foreclosure of a mortgage, is founded on a sufficient consideration.

SAME.—Delivery.—Condition.—Performance.—Statute of Frauds.—A contract, which is so far executed as that a deed has been delivered under it conditionally, is taken out of the statute of frauds when the condition is performed.

PLEADING.—Contract.—Acceptance of Proposition.—Where facts are pleaded which show an acceptance of a proposition, it is not necessary to allege an acceptance in express terms.

From the Sullivan Circuit Court.

J. C. Briggs and *W. C. Hultz*, for appellant.

J. T. Hays, *H. J. Hays*, *J. T. Beasley* and *A. B. Williams*,
for appellee.

McCasland v. The Aetna Life Insurance Company.

ELLIOTT, J.—The complaint of the appellee seeks to reform a deed and to quiet title to the land which the grantor intended to convey.

It is contended by the appellant that the complaint is bad because it shows a mistake of law and not of fact. The mistake is shown to have been in the description of the land intended to be conveyed, and such a mistake, while in some cases one of law, is generally one of fact. The office of a description in a deed is not to identify the land, but to supply the means of identification. *Rucker v. Steelman*, 73 Ind. 396. Where, therefore, a mistake is made in describing land, it is a mistake as to the identity of the land, and the question of identity is one of fact and not of law. But we need not further discuss this question, for, in the careful opinion of ZOLLARS, J., in *Baker v. Pyatt*, ante, p. 61, it is fully discussed and set at rest. The rule is, of course, the same whether the instrument is an absolute deed or a mortgage.

Where a mistake in the description of mortgaged lands is carried into the decree of foreclosure, it may be corrected by reforming and reforeclosing the mortgage. This was expressly decided in *Conyers v. Mericles*, 75 Ind. 443, where the subject received full and careful consideration. That case has been often approved.

Where facts are pleaded which show an acceptance of a proposition, it is not necessary to allege in express terms that the proposition was accepted. The complaint before us shows that the proposition made by the appellant was accepted, because it pleads the facts showing an acceptance.

Where a party points out a specific parcel of land to another, and represents that it is described in a particular way, the party to whom the statement is made has a right to rely upon it. As we have said, the question of identity is generally one of fact, and it certainly is so where the party points out the land and represents that it is covered by a particular description.

The appellee had, as we have seen, a right to reform and

Burgh v. The State, *ex rel.* McCormick, Prosecuting Attorney.

reforeclose the mortgage, and a promise made upon an agreement not to sue for a reformation and foreclosure is founded on a sufficient consideration.

Where a promise is so far executed that a deed is delivered under it conditionally, it is taken out of the statute of frauds when the condition is fully performed, for, upon the performance of the condition, the deed becomes effective and the grantee is entitled to it.

Judgment affirmed.

Filed Oct. 29, 1886.

108 132
131 204
133 78

108 132
152 83

106 132
156 201

108 132
157 40
157 290

No. 13,314.

BURGH v. THE STATE, EX REL. MCCORMICK, PROSECUTING ATTORNEY.

TAXES.—False List.—Complaint to Recover Penalty.—Residence of Taxpayer.—Construction of Statute.—A complaint to recover the penalty prescribed by section 6339, R. S. 1881, for making a false tax list, to be sufficient must aver that the defendant was a resident of the township, to the assessor of which it is alleged he gave the false list.

SAME.—Constitutional Law.—The Penalty not a Fine.—Payment into Treasury for Use of County.—Common School Fund.—The fact that the penalty, when recovered, is to be paid into the county treasury for the use of the county, does not bring the statute into conflict with section 2, of article 8, of the Constitution, which provides that fines shall go into the common school fund, as such penalty is not a fine in the sense of the word as there used.

SAME.—Excessive Fines and Penalties.—Discretion of Court.—As the penalty (not less than fifty dollars nor more than five thousand dollars) must be imposed in the sound discretion of the court and in proportion to the gravity of the offence, the statute is not in conflict with section 16 of the Bill of Rights.

SAME.—Double Punishment.—As the wrong for which a penalty is recoverable under such statute is different from the wrong for which a punishment may be inflicted under section 2150, it is not in conflict with the provision of the Bill of Rights forbidding double punishment for the same offence.

From the Martin Circuit Court.

Burgh v. The State, *ex rel.* McCormick, Prosecuting Attorney.

T. M. Clarke and J. T. Rogers, for appellant.

H. McCormick, Prosecuting Attorney, for appellee.

ZOLLARS, J.—This is an action in the name of the State, on the relation of the prosecuting attorney, to recover from appellant the statutory penalty for having made a false tax list. The action is based upon section 6339, R. S. 1881. So much of that section as is material here is as follows:

“If any person * * shall give a false or fraudulent list, schedule, or statement required by this act; he * * shall be liable to a penalty of not less than fifty dollars nor more than five thousand dollars, to be recovered in any proper form of action, in the name of the State of Indiana, on the relation of the prosecuting attorney. The assessor shall forthwith notify the prosecuting attorney of such delinquency or offence, and he shall prosecute such offender to final judgment and execution; and such fine, when collected, shall be paid into the county treasury, for the use of the county, and the prosecuting attorney shall receive ten per centum commission on all moneys so collected and paid in, and a docket fee of ten dollars, to be taxed and collected with costs in such action,” etc.

The following is a fair epitome of the complaint. In May, 1885, the assessor of Rutherford township, in Martin county, called on appellant for a list of all his personal property, money, rights, credits, and choses in action, and received from him a list, which was not a true and correct list of his rights, credits, and choses in action, but was false and fraudulent, in that it did not contain certain described notes and mortgages, which appellant held and owned on the 1st day of the preceding April.

Although requested by the assessor so to do, appellant failed and refused to report the several described notes and mortgages, but falsely and fraudulently reported that he had nothing due him, and gave a false and fraudulent list of his

Burgh v. The State, *ex rel.* McCormick, Prosecuting Attorney.

taxable personal property, etc. The wrong attempted to be charged is the giving of a false and fraudulent tax list.

Appellant seeks a reversal of the judgment against him, upon the action of the court below in overruling his demurrer to the complaint. One objection urged to the complaint is, that it contains no averment that appellant was a resident of Rutherford township, in Martin county. This objection, we think, is well taken.

The tax law, with an exception not material here, requires that the owner shall list, in the township where he resides, his money, etc., and credits due from or owing by any person or persons, body corporate or politic, to him, without regard to the place where the said taxables may exist or be situated. R. S. 1881, sections 6286, 6290.

The above section 6339, upon which this action is predicated, inflicts a penalty in case the list required by the act, the tax law, is false or fraudulent. The act, as we have seen, requires the owner to list his credits, etc., in the township where he resides. He is not required to list them in any other township. Hence, the furnishing of a false list of such property to the assessor of a township, other than that in which the owner may reside, will not subject him to the penalty provided by the above section 6339.

That section is penal in character, and to make a case against a person for the penalty therein provided, enough must be averred to show that he is within its terms. As said in the case of *Western Union Tel. Co. v. Axtell*, 69 Ind. 199, "A court can not create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it." See *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495; *Western Union Tel. Co. v. Harding*, 103 Ind. 505 (508). See, also, as somewhat analogous, *Lose v. State*, 72 Ind. 285; *Stribbling v. State*, 56 Ind. 79.

The complaint being fatally defective for the reason above

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stated, the judgment must be reversed for the error of the court below in overruling the demurrer thereto.

Here this opinion might be closed but for the fact that other questions are discussed, that will not cease to be material with the reversal of the judgment.

Section 2, of article 8 (R. S. 1881, section 183), of the Constitution, provides, that fines assessed for breaches of the penal laws of the State, shall go into, and be a part of the common school fund. It is contended, that as the above section 6339 requires the penalty therein provided to be paid into the county treasury for the use of the county, it is in contravention of the above constitutional provision. The answer is, that the constitutional provision has reference to fines assessed in criminal prosecutions, and that the penalty provided in section 6339, *supra*, is not a fine in that sense. It is not to be recovered by a criminal prosecution, but by a civil action. At one place in the section, the penalty is spoken of as a fine, but the whole section shows that it is not a fine, in the sense in which that word is used in the above section of the Constitution.

It is further contended that the section of the statute under consideration is in contravention of section 16 of the Bill of Rights. R. S. 1881, section 61.

That section provides that excessive fines shall not be imposed ; that cruel punishment shall not be inflicted ; and that all penalties shall be proportioned to the nature of the offence.

Conceding for the present, without in any way deciding, that the penalties spoken of in that section may include such penalties as are provided in section 6339, *supra*, yet we can not hold that that section is in conflict with the Bill of Rights. The inhibition is against the passage of laws imposing fines and penalties that may be unreasonable and oppressive. Whether fines and penalties are so unreasonable and oppressive must rest largely with the Legislature.

Section 6339 provides that a person making a false and

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fraudulent tax list shall be liable to a penalty of not less than fifty dollars and not more than five thousand dollars.

Under that section, a court might impose the penalty of five thousand dollars upon a person who has fraudulently omitted from his tax list but a small portion or amount of his taxable property. But the fact that the penalty is fixed at amounts between fifty dollars and five thousand dollars, shows that the Legislature understood and intended that the penalty imposed in any particular case should be in proportion to the gravity of the wrong, and that the amount to be imposed in any particular case should be left to the sound discretion of the court.

If a taxpayer should fraudulently omit from his tax list a sufficient amount of property to yield twenty thousand, or even ten thousand dollars of taxes, it could not be declared by the courts that the imposition of a penalty of five thousand dollars would be so unreasonable or oppressive as to overthrow the statute.

The courts having discretion, it must be presumed, in favor of the constitutionality of the act, that that discretion will be wisely and justly exercised. The section gives latitude for the imposition of a heavy penalty, but it must be remembered that the wrong for which it may be imposed, is a grave wrong, both as against the public and the honest tax lister.

The most serious question in the case is, as to whether that portion of the section of the statute here involved is in conflict with that provision of the Bill of Rights which provides that a person shall not be twice punished for the same offence. R. S. 1881, section 59.

Section 2150, R. S. 1881, provides, that "Whoever, when requested by the assessor, * * * fails to give a true list of all his taxable property, or to take and subscribe any oath in that behalf, as required by law, * * * upon conviction thereof, shall be fined not more than five hundred dollars nor less than ten dollars."

After a careful consideration, we have concluded that the

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portion of the section above set out, which is all that is pertinent here, is negative in its character—that is, it provides a fine for not doing that which the law requires. The wrong for which the fine is provided is not a false oath, nor the making of a false or fraudulent tax list, but the failure on the part of the property-owner, when requested, “to take and subscribe” the required oath, and the failure and refusal to give a list of all his taxable property.

On the other hand, the wrong for which the penalty is to be imposed under that portion of section 6339, above set out, is not the failure and refusal to furnish the tax list, but the giving of a false and fraudulent list.

For the refusal, under section 2150, a fine is to be inflicted. For the furnishing of a false and fraudulent list, section 6339 provides a penalty. The wrongs, we think, are different. And hence it can not be said that the two sections provide for a double punishment for the same offence, whatever might have been the result were the wrongs the same. For a full discussion of the general subject, see the case of *State, ex rel., v. Stevens*, 103 Ind. 55 (53 Am. R. 482).

Other questions are discussed by counsel, but as they may not arise upon a remodelling of the complaint, we need not now decide them.

Judgment reversed.

Filed Oct. 30, 1886.

No. 12,415.

PALMER v. THE LOGANSPORT AND ROCK CREEK GRAVEL
ROAD COMPANY.

INJUNCTION.—*Turnpike Company.*—*Possession of Public Highway.*—*Consent of County Commissioners.*—*Pleading.*—*Presumption.*—It will be presumed, in a suit to enjoin a gravel road company from exercising corporate franchises over a public highway, of which, it is alleged, it has taken possession, that its possession is with the consent of the county commissioners, and legal, unless there is an averment to the contrary.

108	137
155	64
156	98

108	137
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SAME.—*Exercise of Corporate Franchises.—Right of Land-Owner to Sue.—Complaint.—Remedy.*—A complaint by a land-owner through whose property a public highway passes, charging the defendant, a gravel road company, with unlawfully taking possession of such highway and exercising corporate franchises thereon, does not show a right of action in the plaintiff for relief by injunction or otherwise.

SUPREME COURT.—*Insufficient Complaint.—Subsequent Errors Harmless.—Affirmance of Judgment.*—Where the plaintiff appeals and his complaint is held insufficient, any subsequent error in the record will be deemed harmless and the judgment affirmed.

From the Cass Circuit Court.

G. E. Ross, for appellant.

D. C. Justice, for appellee.

Howk, C. J.—In this case, the appellant Palmer sued the appellee in a complaint of two paragraphs, in each of which he sought to enjoin appellee, and all persons claiming under it, from entering upon and taking possession of a certain highway, and from erecting and maintaining thereon toll-houses and toll-gates, and from in any manner interfering with or obstructing the rights of appellant, and of those for whom he sued, to travel over such highway. The cause was put at issue and tried by the court; and, at appellant's request, the court made a special finding of the facts of this case and thereon stated its conclusions of law, in appellee's favor. Over appellant's exceptions to the court's conclusions of law, and over his motion for a new trial, the court rendered judgment in appellee's favor for its costs in this action expended.

In this court, appellant has assigned, as errors, the overruling (1) of his demurrer to the second paragraph of appellee's answer to the first paragraph of his complaint, and (2) of his demurrer to the second paragraph of answer to the second paragraph of his complaint, (3) the sustaining of appellee's demurrer to the first paragraph of his reply, (4) error of the court in its conclusions of law, and (5) the overruling of his motion for a new trial herein.

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Appellee has also assigned, as cross errors, the overruling (1) of its demurrer to the first paragraph of appellant's complaint, and (2) of his demurrer to the second paragraph of such complaint.

In the natural order of things, of course, these cross errors first require our attention and consideration; for, if the appellant has not stated a cause of action against the appellee, in either paragraph of his complaint herein, it is wholly immaterial whether or not the trial court committed any errors and, if so, what errors, in its subsequent rulings in the progress of this cause. In the first paragraph of his complaint herein, appellant alleged, in substance, that, on October 5th, 1883, he was, and had been for more than twenty years, the owner in fee simple of the northeast quarter of section 24, in township 26 north, of range 2 east, and also the south half of the southwest quarter of section 1, in township 26 north, of range 2 east, all in Cass county, Indiana; that during all such time, he had occupied such real estate as and for his home; that through his said land, there was located a public highway which, after passing through his lands, ran in a northeasterly direction to the city of Logansport, and was the only way whereby he could reach such city; that such highway had always been known as the "Kokomo Road," was originally laid off by the proper authorities as a public highway, and, for more than twenty years, had been worked and used as a highway; that large sums of money had been expended by appellant and other persons, living along the line of such road and through whose land it passed, and by the public authorities, in grading and improving it and making it fit for public travel.

Appellant alleged that he brought this suit for himself and other parties, who owned the lands through which such road passed, whose names were too numerous to be stated in the complaint herein, and he averred that such highway had been a public thoroughfare, at all times open to the public without objection or hindrance from any person or persons,

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to travel the same without charge; that appellee, the Logansport and Rock Creek Gravel Road Company, without any authority of law, had entered upon and taken possession of such highway, and intended to construct, on and along the same, toll-houses and gates to prevent appellant and the other persons, for whom this suit was brought, from travelling on and along such highway, except upon such terms and conditions as appellee might impose; that appellee intended thus and thereby to convert such highway into a private road and to compel appellant and the other persons, for whom this suit was brought, to pay for riding or driving on and along the same, thus and thereby obstructing the same; that appellant was the owner in fee of the soil upon which such highway was constructed through his lands, as were the other parties, for whom this suit was brought, the owners in fee of the soil upon which such road was constructed through their lands; that appellant and such other parties never parted with any interest in such soil, except an easement for a public highway free for them and the general public to travel, without let or hindrance, nor were any damages ever assessed, tendered or paid to them; that appellee had never obtained the consent of appellant, or of those for whom he sued, to take possession of such highway or to construct toll-houses and gates thereon, nor had his or their damages ever been assessed and tendered him or them by appellee; that all of appellee's acts were without any authority of law, and in violation of appellant's rights; that such highway was necessary for appellant and those persons for whom he sued, as by it alone they had access to the city of Logansport, their market town, and for the enjoyment of their property it was necessary that such highway should be kept open and free; and that, for this reason, they had an interest in such highway separate and distinct from that of the general public therein. Wherefore, etc.

In the second paragraph of his complaint, after having stated substantially the same facts as he had averred in the

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first paragraph, appellant further alleged that, on the 22d day of February, 1882, appellee filed a copy of its articles of association in the recorder's office of Cass county; *that by section 3624, R. S. 1881, appellee was required to file such copy of its articles of association, in such recorder's office, setting forth therein the line of the route which it intended to occupy, etc.; that appellee's articles of association described the route, beginning point and terminus of such road, as proposed to be occupied by it, as follows: "Commencing at a point in Godfrey's Reserve, in range one east, on Clay street, opposite the south end of Humphrey street, in Taberville, in Cass county, where such street intersects Clay street; thence following the line known as the extension of Humphrey street to its intersection with the Kokomo road; thence southeast to the south line of the Godfrey Reserve in section one; thence due south, on the half section line of sections 12 and 13, in township 26, range 1 east, to the southwest corner of the southeast quarter of such section 13; thence due east on the line dividing sections 13 and 24, and 18 and 19, in said township, to the southeast corner of the southeast quarter of section 18, in said township and range, which shall be the terminus of said road." And appellant averred that there was no such point of beginning as that set out in such articles of association; that no such point could be found, as the one therein described; that there was none such in existence; that there was no point in Godfrey's Reserve, in section one, where Humphrey street intersected Clay street, in the town of Taberville, in Cass county; that appellee had never complied with the requirements of section 3624, R. S. 1881, that it should file a copy of its articles of association in the recorder's office of Cass county, showing its route; and that, therefore, appellee had derived and possessed, under its articles of association, no right to construct and operate a gravel road. Wherefore, etc.

To each of these paragraphs of complaint appellee's demurrer, for the alleged insufficiency of the facts therein to

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constitute a cause of action, was overruled by the circuit court. To these rulings appellee at the time excepted, and it has assigned them here, as cross errors, and its learned counsel earnestly insists, in argument, that these cross errors are fundamental, and show that appellant was not harmed by any of the errors, conceding them to be such, of which he complains.

We are of opinion that appellant has not stated facts sufficient, in either paragraph of his complaint, to constitute a cause of action against the appellee, in favor of himself or of the numerous other persons for whom he has brought this suit. In the first paragraph of complaint, nothing is alleged, beyond the statement that appellee's action, in entering upon and taking possession of the "Kokomo Road," and in erecting toll-houses and gates thereon, was without any authority of law, or unlawful. This, it will be observed, is not the statement of any fact, but is merely the pleader's conclusion from facts which are not stated and are not apparent.

In section 3628, R. S. 1881, in force since May 6th, 1853, provision is made that the directors of a gravel road corporation, such as the appellee, may locate its road "over and upon any State or county road, or other public highway, with the consent of the board of county commissioners of the county, entered of record and granted upon such conditions as to such board may seem just and reasonable." Where, therefore, as here, it appears or is shown that a gravel road corporation has entered upon and taken possession of a public highway, it will be presumed, in the absence of any averment to the contrary, that such possession is with the consent of the proper county board, and is, therefore, authorized by law. If it were the fact, that appellee's entry upon and possession of the "Kokomo Road" were without the consent of the board of commissioners of Cass county, the fact should have been averred by appellant, and the conclusion would have followed, without any averment, that such entry and possession were unauthorized by law, or unlawful. The civil

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code requires, and our decisions enforce the rule, that the facts must be pleaded, and not legal conclusions.

But, if the appellant had pleaded the facts in the case now before us, neither paragraph of his complaint would, we think, have shown any cause or right of action either in him or in those for whom he brought this suit. The substance of the charge against appellee, in each paragraph of complaint, is, that it had entered upon and taken possession of the "Kokomo Road," and was exercising thereon the rights, privileges and franchises of a gravel road corporation, without any authority of law. Admitting the truth of the facts alleged in either paragraph of the complaint, precisely as they are stated therein, it does not follow by any means, that these facts are sufficient to show any cause or right of action against appellee, in favor of appellant or of those for whom he sued, or to entitle him or them to the relief prayed for, or any other relief, as against the appellee. It is not enough, in such a case, that the complaint, or either paragraph thereof, should state such facts as would have required the appellee, in an information, in the name of the State, on the relation of the proper prosecuting attorney, to have shown by what warrant or authority it had entered upon and taken possession of the "Kokomo Road," and had exercised corporate franchises thereon. That is all that appellant has shown by the facts stated in either paragraph of his complaint herein, and they do not entitle him, or those for whom he has sued, to the relief demanded, or to any other relief against the appellee. This is settled by our decisions. *State, ex rel., v. Bailey*, 19 Ind. 452; *White v. State*, 69 Ind. 273; *Hasselman v. United States Mortg. Co.*, 97 Ind. 365; *Williamson v. Kokomo, etc., Ass'n*, 89 Ind. 389; *North v. State, ex rel.*, 107 Ind. 356.

If it be conceded that the complaint shows, that the acts of the appellee in entering upon, taking possession of, and exercising corporate franchises over the "Kokomo Road," were unauthorized by law, still it must be held, we think,

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that those acts do not give the appellant, or those for whom he has sued herein, any cause or right of action against appellee. *Wilson v. Gale*, 103 Ind. 257; *Sinker v. Floyd*, 104 Ind. 291; *Walker v. Heller*, 104 Ind. 327; *Frazer v. State, etc.*, 106 Ind. 471.

We are of opinion, therefore, that the court below erred in overruling appellee's demurrers to each paragraph of appellant's complaint herein.

This conclusion renders it unnecessary for us to consider any of the errors assigned by the appellant. Where, as in this case, the plaintiff is the appellant, and his complaint is held to be insufficient, any subsequent error appearing in the record must be regarded as harmless, and the judgment must be affirmed. *Fell v. Muller*, 78 Ind. 507; *Clawson v. Chicago, etc., R. W. Co.*, 95 Ind. 152; *Ice v. Ball*, 102 Ind. 42.

The judgment is affirmed, with costs.

Filed Oct. 28, 1886.

No. 11,258.

PFAFF, AUDITOR, ET AL. v. THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

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150 231

TAXES.—*Valuation and Assessment of "Railroad Track."*—*State Board of Equalization.*—Under the revenue acts of this State, the State board of equalization has exclusive authority to value and assess the railroad property denominated "railroad track" and "rolling stock." Section 6410, R. S. 1881.

SAME.—*Right of Way.*—*Improvements.*—The right of way, with the improvements upon it, is to be valued and assessed as "railroad track." Section 6362, R. S. 1881.

SAME.—*What Term "Right of Way" Includes.*—The term "right of way" is not limited to a strip of land of any definite width at all points on the line of a railroad, but includes lands and lots acquired for necessary side tracks and turnouts, and the improvements thereon in the way of coal sheds, freight houses, water-tanks, repair shops, round-houses, and the like.

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RAILROAD.—*Power to Acquire and Hold Real Estate.*—Railroad companies may acquire and hold land other than that occupied by their tracks.

From the Marion Superior Court.

C. S. Denny, W. W. Woollen and I. Klingensmith, for appellants.

B. Harrison, C. C. Hines, W. H. H. Miller and J. B. Elam, for appellee.

ZOLLARS, J.—Appellee owns, and for a number of years has owned, some small tracts of land, and some lots and parts of lots in the city of Indianapolis, aggregating about twelve acres. The purposes for, and the manner in which those lands and lots are and have been used, are stated in the complaint as follows:

“Plaintiff shows, that upon the above described portion of block 94, is situated its freight house, through which two tracks run, and on each side of which there are tracks belonging to plaintiff, connected with its main line of track situate on Louisiana street in said city of Indianapolis; that upon said part of out-lot 135, plaintiff has constructed a round-house for its locomotives, a small shop for repairing locomotives, a coal shed, a wood shed, and some water-tanks; that the balance of said out-lot 135, together with all the other real estate above described, except a portion of block 94, is occupied by the main track, and side tracks of this plaintiff, and is used exclusively for track purposes.”

It is further alleged in the complaint, that in 1880 and 1881, the railroad company made return of its main track, and all of said side tracks upon the said lands and lots, to the State board of equalization, and that that board valued and assessed the same for taxation, consisting of $\frac{5.6}{100}$ of a mile of main, and eight $\frac{15}{100}$ miles of side tracks, including the lands and lots upon which they were situated, and all the improvements thereon, as “railroad track;” that upon the valuation thus made by the State board, the respective

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officers of Marion county, and of the city of Indianapolis, extended all taxes levied by the county and city respectively, and that the taxes so levied had been paid.

It is still further alleged, that notwithstanding the assessment as above stated, and the payment of the taxes, the county and city, by their local assessors and officers in each of said years, made an assessment of the above described lots and lands, together with the improvements, and levied taxes thereon, claiming that they are not included in the term "railroad track," and that, therefore, they may be assessed and taxed by the county and city authorities as other lands are assessed.

The railroad company having refused to pay the taxes so assessed by the local authorities, the lots and lands were sold by those authorities. This action against the proper city and county officers, and the purchaser at the tax sale, is to enjoin the execution of a deed to the purchaser, to enjoin any further attempt to collect such taxes, and to quiet its title to the lots and lands.

The question presented by the record is, are the lots and lands so occupied with tracks, side tracks, and buildings, to be valued and assessed by the State board of equalization as "railroad track," or may they be valued and assessed by the county and city authorities as other lands are assessed?

The answer to this question is dependent upon the construction to be given to our revenue laws. As there is no material difference between the revenue acts of 1872 and 1881, so far as they affect the question under examination, we shall make reference only to the act of 1881, and to the sections as numbered in R. S. 1881.

It is very plain, that under the revenue acts, the State board of equalization alone has authority to value and assess the railroad property, denominated "railroad track" and "rolling stock." Section 6410.

The important question here is, what is included in the term "railroad track?" Does that term include the lands

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described in the complaint, being small tracts of land and lots which are occupied by the side tracks, turnouts, round-house, a small repair shop, coal and wood sheds, water-tanks and turn-tables, etc. ?

Section 6362 provides, that "Such right of way, including the superstructures, main track, side or second tracks, and turnouts, turn-tables, telegraph poles, wires, instruments, and other appliances, and the stations and improvements of the railroad company on such right of way (except machinery, stationary engines, and other fixtures, which shall be considered personal property), shall be held to be real estate for the purpose of taxation, and denominated 'railroad track,' and shall be so listed and valued, and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track, and embracing the same, together with all the stations and improvements thereon, commencing at a point where such railroad track crosses a boundary line in entering the county, township, city, or town, tending to the point where such track crosses the boundary line leaving such county, township, city, or town to the point of termination in the same, as the case may be, containing — acres, more or less (inserting name of county, township, city, or town, or boundary line of same, and number of acres and length in feet); and when advertised or sold for taxes, no other description shall be necessary to convey a good title to the purchaser."

This section provides, that the right of way, with whatever is upon it in the way of improvements, is to be valued and assessed as "railroad track."

If a depot building, round-house, machine shop, coal or wood sheds, or water-tank, is upon the right of way, they become a part of the "railroad track," and are to be valued and assessed by the State board of equalization, and can not be valued and assessed by the county or city authorities, as separate and apart from the "railroad track."

The more specific inquiry here is, do the lots and lands

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described in the complaint, and occupied as therein described, constitute a part of the right of way?

The term "right of way" is not limited by any statutory definition, nor by any statutory provision, to a strip of land of any particular and definite width at all points on the line of the railroad. As applied to a railroad company, it means a way over which the company has the right to pass in the operation of its trains. *Williams v. Western, etc., R. W. Co.*, 50 Wis. 71, 76.

A railroad can not be operated with anything like success with a single track. It is necessary to have either a double track, or turnouts and side tracks, in order that trains going in opposite directions may pass. It is just as necessary that there shall be turnouts and side tracks for the making up of trains, the changing of engines, the replenishing of them with water and fuel, and the loading and unloading of freight.

With many of the more important lines, it is often necessary to have many of such turnouts and side tracks, in order that the business may be done with dispatch, in obedience to the demands of commerce and traffic. These side tracks, such as are required at commercial centers, and the larger cities and towns, could not be crowded upon a narrow strip of land, such as may be sufficient between stations. In order that the company may have the requisite amount of such side tracks at such points, it is necessary that it shall have a right of way over a sufficient amount of land upon which to lay and operate them. This right of way the company may acquire by condemnation proceedings, if necessary, R. S. 1881, section 3907.

When such right of way is acquired, by whatever means, the land thus acquired becomes a part of the company's right of way, and thus a part of the "railroad track," as much as that portion occupied by the main track. It seems reasonable, therefore, that the person, or body of persons, who value and assess the one, should value and assess the other. The main track, in connection with such side tracks, make up

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the one system and property. To destroy one, will greatly cripple and reduce the value of the other. The side tracks, and the land upon which they are located, will have a value, measured by the value of the land as land, and the value of the side tracks and improvements thereon, and these all together will add to the value of the whole line in proportion as they afford facilities for the transaction of business over that line. The State board of equalization could not well fix a just valuation upon the railroad without a knowledge of such facilities. And hence the statute requires the railroad company to furnish, annually, a sworn statement to the county auditors of the several counties through which the road may run, of the amount of the main, and all second tracks, side tracks, and turnouts, in the county. The amount of each thus reported to the auditors, they are required to report to the auditor of state. Section 6407.

The statute also requires that the railroad company shall report to the auditor of state the length of the main track, side or second tracks, turnouts, and the number and quality of buildings or other structures on "railroad track," showing the proportion in each county and township. Section 6369.

Both of these statements, thus received, the auditor of state is required to lay before the State board of equalization. Section 6371. If that board is not to value and assess the side tracks, turnouts, etc., the reporting of them would be an idle ceremony, except as they may be considered in fixing the value of the main line. All of the tracks thus reported are to be valued and assessed by that board as "railroad track," and for the purpose of arriving at a just valuation, it may examine persons and papers if necessary. The amounts determined and assessed upon those two items of railroad property, denominated "railroad track," are to be certified by the auditor of state to the auditors of the several counties, and they distribute the value, so certified, to the several townships, cities and towns, in their counties, which are entitled to

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a proportionate value of such "railroad track," and compute and extend taxes against such values. Section 6410.

Section 6363 more explicitly declares how the values so assessed shall be apportioned, by providing that the value of the "railroad track" shall be listed and taxed in the several counties, townships, cities and towns, in the proportion that the length of the main track in such county, township, city or town bears to the whole length of the road in this State; except the value of the side or second tracks, all turnouts, etc., shall be taxed in the county, township, city or town in which the same are located.

Thus, the county, township, city or town gets its proportion of the taxes assessed upon the main line, and the whole of the taxes assessed upon the side tracks and turnouts, and the land upon which they and other improvements are located, to the extent that such side tracks, etc., are located in the county, township, city or town.

It is argued that the portion of the above section, providing that the value of such side tracks, etc., shall be taxed in the county, township, city or town where located, authorizes the valuation and taxation of the lands upon which the side tracks are laid, together with the other improvements thereon, by the local authorities.

That conclusion does not result from the language of the section, and to give the section the construction contended for, would bring it in conflict with the spirit of the act, and, as we think, lead to confusion in the valuation and assessment of railroad property of the character here under consideration.

Section 6364 also provides that the property denominated "rolling stock" shall be listed and taxed in the several counties, townships, cities and towns, but that such "rolling stock" is to be valued and assessed by the State board of equalization, is beyond question.

Here, as we have seen, the land and lots are occupied by side tracks and turnouts, which are used in the operation of

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the road. Upon these lands and lots there are also coal and wood sheds, a freight house, water-tanks, a small repair shop and a round-house. Without going beyond the case to determine what might be the rule as to shops, etc., differently located, it is enough here that the buildings and improvements are all upon lands and lots which are a part of the right of way, and that such right of way, together with all superstructures and tracks, etc., thereon, is "railroad track," to be valued and assessed by the State board of equalization, and can not be valued and assessed by the local authorities. In this conclusion we are sustained by the adjudications upon similar statutes.

It is claimed in argument, that our statute for the taxation of railroad property is a copy of the Illinois statute upon the same subject. However that may be, it is in every material feature the same as the Illinois statute, and hence the adjudications by the Supreme court of that State, upon its statute, are entitled to weight in the construction of our statute.

The exact question here involved was decided in the case of *Chicago, etc., R. R. Co. v. People, ex rel., etc.*, 98 Ill. 350. The railroad company occupied thirty-two acres of land, with side tracks, turnouts, etc., which were used in the making up of trains, receiving and discharging freight, etc., in the transaction of the company's business. The ground was also used for car shops, machine shops, blacksmith shops, foundry, round-house, freight depot, stock yards, paint shop, etc. It was held that the ground thus occupied was a part of the right of way, and hence "railroad track," and that such "railroad track," with all the buildings thereon, is to be valued and assessed by the State board of equalization, and not by the local authorities.

We quote from the decision in that case the following: "These shops are, doubtless, necessary, to insure a successful operation of the railroad; but whether they are or not is not important, as the revenue law anticipated that such structures would be erected on the company's right of way, and

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made express provision, when that was done, that they should form a part of the right of way and be taxed as such. This is apparent from section 42, which declares that the right of way, including superstructures of main, side or second track, and turnouts, and the station and *improvements* of the railroad company *on such right of way*, shall be real estate for the purpose of taxation, and denominated 'railroad track.' The fact, then, that the company has erected and is using shops on this land for the purpose of right of way, does not, in the least, militate against the view that the land is held for right of way. Inasmuch as the exclusive power to assess railroad track and rolling stock has been conferred on the State board of equalization, there seems to be no reason whatever why the power of assessment of property situated as is the property in controversy, should be conferred on the township assessors. The State board has many facilities for making a correct and just assessment which the township assessor can not have. Under section 109 it has power to examine persons and papers where it may be necessary to reach a correct result. The locality where the property is situated gains nothing by an assessment made by the local assessor. Whether the assessment is made by the township assessor, or by the State board under section 43 of the revenue act, the value of side tracks and turnouts, station houses, depots, machine shops, or other buildings belonging to the road, shall be taxed in the county, town, village, district or city in which the same are located, thus giving the locality where the property is situated the benefit of the taxes to be collected from such property, whether it is assessed by the local assessors or by the State board of equalization." See, also, *Chicago, etc., R. W. Co. v. Miller*, 72 Ill. 144; *Chicago, etc., R. R. Co. v. People, ex rel., etc.*, 99 Ill. 464; *State Railroad Tax Cases*, 92 U. S. 575; *Union Pacific R. W. Co. v. Cheyenne*, 113 U. S. 516; *Northampton County v. Lehigh Coal, etc., Co.*, 75 Pa. St. 461; *Toledo, etc., R. R. Co. v. City of Lafayette*, 22 Ind. 262.

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Our statute provides, that all real estate of a railroad company, other than that denominated "railroad track," with all the improvements thereon, shall be assessed by the local authorities. Sec. 6366. It is claimed by counsel for appellant that railroad companies can not hold real estate, other than such as is described in the complaint, and such as may be occupied by the main track, and that, hence, the real estate, other than "railroad track," mentioned in the above section, must be such as that described in the complaint. In all this we think counsel are mistaken. Railroad companies may acquire and hold land other than that occupied by their tracks. *R. S. 1881, sections 3900, 3901; Toledo, etc., R. R. Co. v. City of Lafayette, supra.*

In the answer to appellee's complaint, it is alleged, that in fixing the values, the State board of equalization took into consideration only the tracks, and did not consider the value of the lots and lands, and the buildings thereon; and that the local authorities valued and assessed these. It is claimed that because of the alleged omission on the part of the State board, the local authorities had the right to make the valuation and assessment; and that if they had not, the appellee can not succeed in this action, without first paying, or offering to pay, the taxes due. The difficulty with the contention is, that, so far as shown, appellee had paid all taxes that, in any legal sense, were due. The authority to value and assess the lots and lands, which constitute a part of the right of way, or "railroad track," was and is with the State board of equalization alone.

The local authorities have no power to value and assess such property, and any valuation or assessment that they may attempt is utterly void. The railroad company can owe no taxes upon such property, except such as may be extended upon the valuation fixed by the State board.

It is to be presumed that the State board will do its duty, and value the whole of the right of way, including the land, the tracks and superstructures, as it is alleged in the com-

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plaint was done; but if it should fall short of its duty, as alleged in the answer, the local authorities have no power to do what that board, under the law, is alone authorized to do.

The city further relies upon a section in the general act for the incorporation of cities. Section 3156, R. S. 1881. That section is an amendment of section 58 of the act of 1867, and was passed and approved on the 7th day of March, 1873. So far as material here, the amended section provides that cities, through or into which a railroad may pass, may assess any railroad building, fixtures, and machinery connected therewith, within the city limits, on the same basis and in the same manner that like property of natural persons is assessed, and collect the taxes thereon as other taxes are collected.

Whatever might have been said as to the authority of cities, under that section, in the absence of other legislation, to value and assess buildings situated upon the right of way of a railroad company, it is clear that under subsequent legislation, such authority does not exist. In 1875 an act was passed providing that thereafter the general laws of the State for the assessment of taxes should apply to all incorporated cities not having special charters, so far as the same should be applicable. Acts Regular Session 1875, p. 148; R. S. 1881, section 3263.

As to the assessment and taxation of railroad property, there is no difficulty in applying to cities the general laws of the State for the assessment of taxes. And the result of such an application is, that the city authorities must take the valuation of the right of way of railroad companies from the State board of equalization, and have no more authority to value and assess buildings on such right of way than have the county authorities. Such authority does not exist with either.

In overruling appellant's demurrer to the complaint, and

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in sustaining appellee's demurrer to the answer, the court below ruled in accordance with this opinion.

The judgment is, therefore, affirmed, at appellants' costs.

Filed Nov. 5, 1886.

108 155
124 241

No. 12,715.

DEEGAN ET AL. v. THE STATE, FOR USE OF STODDARD,
DRAINAGE COMMISSIONER.

DRAINAGE.—Complaint to Enforce Assessment.—Petition.—Notice.—Matters of Defence.—A complaint to enforce a drainage assessment, which shows that there was a petition and notice, and a judgment establishing the drain and confirming the assessments, is good without an averment that the defendant's land was described in the petition, or that his name appeared in the petition or notice, these being matters of defence.

SAME.—Irregular Notice.—Jurisdiction.—Collateral Attack.—The drainage law of 1883 requires the petition to be filed before the notices are posted, but the fact that it is filed the day after is a mere irregularity, and not in itself sufficient to defeat the collection of an assessment.

From the Porter Circuit Court.

J. M. Howard and *E. P. Hammond*, for appellants.

E. D. Crumpacker and *P. Crumpacker*, for appellee.

MITCHELL, J.—This was a suit by Stoddard, as drainage commissioner, against Margaret H. Deegan and her husband, to enforce the collection of an assessment for drainage purposes against the lands of Mrs. Deegan.

The assessment was made in pursuance of proceedings instituted and had under the circuit court act of 1881, as amended by the act of 1883.

The complaint avers that Paul Freed petitioned the Porter Circuit Court, setting forth the necessity for the drainage of certain lands, and that he gave due notice of the filing of such petition by posting up notices thereof in three public

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places in each township in which the lands described in such petition were situate.

The complaint avers that such further proceedings were had in that behalf, as that an assessment of benefits amounting to \$70 was made and duly confirmed against the appellants' lands, and that the commissioner of drainage duly called for eighty per cent. thereof, which remains due and unpaid.

It is now said that because the complaint fails to aver that the appellants' lands were described in the petition, or that either of the appellants' names appeared in the petition or notice, it was fatally defective, and that error was committed by the court below in overruling the appellants' demurrer thereto.

Substantially the same objections were made to a complaint in the analogous case of *Jackson v. State, etc.*, 104 Ind. 516, where it was held, that a complaint to enforce a drainage assessment, which shows that a petition had been filed and notice given, and that these were followed by such proceedings as resulted in a judgment establishing the drain, and confirming the assessments, is good as against a collateral attack.

Where it appears that there was a petition and notice, in a given case, thus invoking the jurisdiction of the court over a subject-matter, and over persons affected by a judgment finally given in such case, the presumption will be indulged, when the proceedings are drawn in question collaterally, that the petition and notice were in all respects sufficient to uphold the judgment, and such as the law required. *Indianapolis, etc., G. R. Co. v. State, ex rel.*, 105 Ind. 37; *Pickering v. State, etc.*, 106 Ind. 228, and cases cited; *McMullen v. State, ex rel.*, 105 Ind. 334.

If assessments were made against lands not described in the petition, or against persons, without an attempt to give such notice as the law requires, these become matters of defence as against a complaint which alleges a petition and notice.

There was a special finding of facts by the court, and conclusions of law stated thereon.

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It appears from the special findings of the court, that Freed, who petitioned for the ditch, posted notices on March 19th, 1883, of his intention to present his petition for the establishment of the drain, to the Porter Circuit Court, on the 9th day of the ensuing April, and that he did not file his petition until the day after the notices were posted. The proceedings having been instituted under the act of March, 1883, which requires the petition to be filed before the notices are posted, it is now contended that because there was no petition on file when the notices were posted, the notices given, as well as the subsequent proceedings, were void. *Mills v. State*, 10 Ind. 114, *Jones v. Porter*, 23 Ind. 66, *Briggs v. Sneghan*, 45 Ind. 14, and *Brooks v. Allen*, 62 Ind. 401, are relied on as sustaining this view.

The cases which lend any support to the position contended for, are cases which bring in question, on a direct appeal, the validity of a summons issued in a civil case before the filing of a complaint. They hold that a summons so issued is invalid and void, and that unless notice is waived by an appearance, a default will not be authorized on such summons. Without further examination of these cases, they do not, in our opinion, exert a controlling influence here where the attack is collateral.

The controlling fact in the case we are considering is, that at the time the court took jurisdiction of the proceedings and gave judgment, there was a petition before it, and some notice had been given. That the notice was prematurely given, was at most but an irregularity. In this proceeding, we must assume that the court passed upon and adjudged both the petition and notice sufficient. However erroneous this judgment may have been, it was not void. Not being void, it can not be assailed in this indirect method for mere irregularities and defects. This precise question was made and determined in the case of *McMullen v. State, ex rel.*, *supra*.

As we find no error, the judgment is affirmed, with costs.

Filed Nov. 4, 1886.

The Board of Commissioners of Montgomery County v. Bromley.

No. 13,000.

THE BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY
v. BROMLEY.

TOWNSHIP TRUSTEE.—Overseer of Poor.—Limit of Compensation.—Statute Construed.—Under section 32 of the act of March 31st, 1879 (section 6009, R. S. 1881), a township trustee is entitled to two dollars per day, payable out of the township fund, for services rendered in the ordinary business of the township, and to the same rate of compensation, payable out of the county treasury, for services as overseer of the poor; but he is not entitled to receive two dollars from each source for the same day's services, that amount being the limit of his compensation from either or both, according as the services are performed.

SAME.—Intermingled Services.—Action Against County for Services as Overseer.—Reimbursement of Township for Overcharges.—Where a township trustee during his term intermingles his services for the township and as overseer of the poor, and receives full compensation from the township fund for every day when he performed any official duty, he can not recover compensation from the county for services as overseer, on the ground that he is liable to reimburse the township fund for the amount overcharged for other official services.

From the Montgomery Circuit Court.

J. H. Burford, for appellant.

R. B. F. Peirce, W. T. Brush, J. Wright and J. M. Seller,
for appellee.

NIBLACK, J.—The proceeding which led to this appeal was commenced by the filing of a claim by William Bromley against Montgomery county, before the board of commissioners of that county, for services as overseer of the poor, while formerly acting as trustee of Union township of the county in question.

The commissioners rejected the claim, and Bromley appealed to the circuit court, where the cause was tried without a jury.

At the request of one of the parties, the circuit court made a special finding of the facts, which may be synoptically stated as follows:

That Bromley was the duly elected, qualified and acting

108	158
142	497

108	158
165	102

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trustee of said township of Union from the 17th day of April, 1882, to and including the 17th day of April, 1884; that during all that interval of time, Sundays excepted, Bromley, as such trustee, kept his office open for the transaction of the township business, performing some duty as trustee of said township upon every working day during his official term; that for his services, as such township trustee, Bromley charged, and was allowed and paid, the sum of two dollars per day for each and every day of his term of office, Sundays only excepted, out of the township funds of his township; that a room, called an office, for the transaction of the township business, was provided at the expense of the township; that the duties devolving upon Bromley during his term were so extended and continuous as to require him to be in and keep his office open every working day for the transaction of official business; that during his official term Bromley performed the duties of overseer of the poor of his township, in which the city of Crawfordsville was situate, and which contained a population of about ten thousand persons, of which a large number were poor people, requiring almost daily attention of some kind; that during every day on which he, Bromley, performed any duty as overseer of the poor, he also performed some service as township trustee for which he had been paid out of the township fund as above stated; that during his term of office, he was, for three hundred days, engaged in the performance of his duties as overseer of the poor of his township, for which he had received no compensation; that his, Bromley's, claim for services as overseer of his township was made out, duly certified and filed with the auditor of Montgomery county, on the 9th day of May, 1884.

Upon the facts thus specially found, the circuit court came to the conclusion that Bromley ought to recover a compensation for his services as overseer of the poor at the rate of two dollars per day for three hundred days, and that he was

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consequently entitled to have judgment against Montgomery county for \$600.

Over exceptions reserved, judgment was rendered accordingly.

Error is assigned only upon the conclusions of law at which the circuit court thus arrived, the argument in support of the assignment of error being that a township trustee can not receive two full, separate and distinct compensations for the same day's services, that is to say, that a township trustee can not receive from the township fund two dollars for a day's services rendered in the transaction of ordinary township business, and then demand and receive an additional compensation out of the county treasury for services performed on the same day as overseer of the poor.

The first section of "An act for the relief of the poor," approved June 9th, 1852, provided that "the township trustees of the several civil townships of this State shall be the overseers of the poor" within their respective townships, and shall perform all the duties with reference to the poor of their respective townships that may be prescribed by law. 1 G. & H. 493. That section is still in force, subject only to the intervening legislation reducing the number of township trustees to one in each township. R. S. 1881, section 6066. The second section of the same act further provided that "Every township trustee shall, in discharging the duties prescribed in this act, be designated an 'overseer of the poor,' " and that section is still in force. R. S. 1881, section 6067. The twentieth section of the act in question (R. S. 1881, section 6085), still further provided that the overseer of the poor in each township should be entitled to receive one dollar per day for each day necessarily employed in the discharge of his duties as such overseer of the poor, to be allowed by the board of commissioners of his county. The same *per diem* compensation was then allowed to a township trustee while engaged in the performance of his other duties, to be paid out of the township fund. 1 R. S. 1852, 290.

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It was, in effect, decided in the case of *Board, etc., v. Fischer*, 86 Ind. 139, that all laws theretofore relating to the compensation of township trustees, whether acting as overseers of the poor or otherwise, had been superseded and repealed by the acts of March 8th, 1873, and of March 12th, 1875, respectively, and that under each of those acts a township trustee was only entitled to receive the *per diem* compensation therein respectively allowed without reference to the particular services which he might have performed, payable in all cases only out of the township fund; and to that construction of the acts in question we still adhere. The various statutory provisions prescribing the duties, as well as the compensation, of township trustees, have been enacted upon the evident theory that all the time of each trustee would not be occupied in the discharge of the duties of his office. That is well illustrated by the provisions of section 6008, R. S. 1881, which requires a township trustee to designate certain days in each week, or month, in which he will attend to the business of his township, and to cause notice to be given of the days so designated. It is equally evident that when the present township system was entered upon, it was with the expectation that the time which a township trustee should devote to the business of overseeing the poor should be kept and charged for separately from the time occupied in the discharge of other official duties.

This inference is fully justified by the provision of the act of June 9th, 1852, which made services as overseers of the poor a charge upon the county funds of the several counties, when all other services required of a township trustee were to be paid for out of the proper township fund. The policy of paying for services as overseer of the poor out of a separate fund seems, as shown by the case of *Board, etc., v. Fischer, supra*, to have been abandoned for a series of years, but it has been returned to by the act of March 31st, 1879.

The 32d section of that act is in these words: "The *per*

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diem of township trustees shall be as follows: For each actual day's service they shall be allowed, to be paid out of the township fund, two dollars: *Provided*, That for all services as overseer of the poor, said township trustee shall be paid out of any funds in the county treasury not otherwise appropriated, on the order of the board of county commissioners." That section is still in force. See R. S. 1881, section 6009.

As a statutory provision, that section might, perhaps, have been so framed as better to express the precise legislative meaning intended to be conveyed, but construed in the light of antecedent legislation, and with reference to the purpose which the Legislature clearly had in view in passing the act of March 31st, 1879, we interpret it to mean that for services in the ordinary civil and school business of the township, the trustee shall be paid at the rate of two dollars per day out of the township fund, and that for services as overseer of the poor, he shall be paid at the same rate out of the county treasury, and that separate accounts must be kept of the amount of each class of services rendered from time to time.

We further interpret the section under consideration to mean that, as applicable to both classes of service, an allowance of only two dollars can be made for an actual day's service, without reference to the manner in which the day may have been divided between the two classes of service, and that, consequently, a township trustee is not entitled to receive, out of any fund, more than two dollars for official services performed during any one day. We are strengthened in this interpretation by the conclusion reached in the case of *Stout v. Board, etc.*, 107 Ind. 343, which was that the legislative intention in passing the act of March 31st, 1879, was to reduce rather than increase the aggregate amounts to be allowed for fees and salaries to public officers. Besides, the policy of our law is not favorable to the payment of constructive fees for official services. *Wright v. Board, etc.*, 98 Ind. 88; *Board, etc., v. Gresham*, 101 Ind. 53.

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It is finally contended that Bromley is, in any event, entitled to recover from the county the value of his services as overseer of the poor, subject to his liability to have to reimburse the township fund for the amount overcharged for other official services. But, having intermingled his services as overseer of the poor with his other official duties, and having received full compensation from the township fund for every day during which he performed any official duty, he is now precluded from recovering any further compensation from the county, or from any other fund.

The judgment is reversed, with costs, and the cause remanded, with instructions to state conclusions of law in accordance with this opinion, and to render judgment accordingly.

Filed Nov. 3, 1886.

No. 12,783.

THE WESTERN UNION TELEGRAPH COMPANY v. STEELE.

STATUTES.—*Penal.—Construction.*—Penal statutes must be strictly construed.

TELEGRAPH COMPANY.—*Transmitting Message.—No Penalty for Mere Neglect.—Statute Construed.*—Under the act of 1885, an action will not lie against a telegraph company to recover a penalty for neglect in transmitting a message, that act providing a penalty only for bad faith, partiality and discrimination.

From the Montgomery Circuit Court.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

G. W. Paul, J. E. Humphries, W. E. Humphries, W. M. Reeves and J. S. Zuck, for appellee.

ELLIOTT, J.—The appellee instituted this action to recover the penalty imposed for a breach of duty by the statute.

The telegram was delivered to the appellant on the 23d day

108	163
137	77
108	163
149	300
108	163
157	48
157	44
157	290

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of May, 1885, and the statute which governs is that enacted in 1885, for that act repeals the earlier one. *Western Union Tel. Co. v. Brown, post*, p. 538.

The complaint must, therefore, be good under the provisions of the later act.

It is settled law that a penal statute must be strictly construed, and we are, therefore, required to confine the operation of the statute to the cases which it specifies, for we can not extend it by construction. Acting upon this rule, we must hold that the act of 1885 does not prescribe a penalty for neglect in transmitting messages. This conclusion is, indeed, the only one that can be reached without greatly enlarging the words of the statute, and it is strengthened by the fact that the statute which the act of 1885 repeals prescribed a penalty for a negligent breach of duty, while that of 1885 contains no such provision, thus clearly evincing the intention of the Legislature not to give a penalty for a negligent breach of duty.

The act of 1885 prescribes a penalty for a breach of duty only in three cases, bad faith, partiality, discrimination, and the complaint before us shows, at most, a mere neglect of duty, and fails entirely to show bad faith, partiality or discrimination.

Judgment reversed.

Filed Nov. 5, 1886.

No. 12,677.

THE BOARD OF COMMISSIONERS OF POSEY COUNTY v. HAR-
LEM ET AL.

PRACTICE.—*Bill of Exceptions.*—*Motion to Dismiss.*—*Supreme Court.*—Where motions to dismiss, and to strike out evidence, and the rulings thereon, are not made parts of the record by a bill of exceptions or an order of the court, no question thereon is presented on appeal.

108	164
147	456
108	164
161	152

The Board of Commissioners of Posey County v. Harlem *et al.*

JURISDICTION.—*Circuit Court.—Claim Against County for Supplies to Poor Persons.—Township Trustee.*—The circuit court has appellate jurisdiction of a claim against a county for supplies furnished to poor persons, on orders of a township trustee, where it has been presented to and disallowed by the county commissioners.

POOR.—*Relief of.—Discretion of Township Trustee.*—Under the provisions of the law of this State for the relief of the poor, the poor of each county and the transient poor shall receive all necessary relief at the expense of the proper county; and the nature and extent of such relief in each particular case is largely entrusted to the sound discretion and practical judgment of the township trustee as overseer of the poor.

SAME.—*Permanent or Temporary Relief.*—Whether it will be better, in any case, to remove a resident poor person to the county asylum, as a permanent charge, or to afford him temporary relief merely, is a question for the determination of the township trustee.

SAME.—*Evidence.—Orders of Trustee not Conclusive, but Admissible in Action Against County.*—The orders issued by a township trustee for supplies to poor persons are not conclusive upon him or the county, but they are admissible in evidence in support of a claim against the county by the person furnishing the supplies, where there is evidence *aliunde* that the supplies were furnished to the persons named in the orders, and that they were entitled to the relief.

From the Posey Circuit Court.

E. M. Spencer, A. P. Hovey and G. V. Menzies, for appellant.

J. W. French, D. O. Barker and W. P. Edson, for appellees.

HOWK, C. J.—The record of this cause shows that prior to the 24th day of March, 1884, appellees, Michael and Jacob Harlem, partners, under the firm name of M. Harlem & Son, presented to the appellant, for allowance, an itemized account for supplies furnished by them, on the orders of the trustee of Black township, in Posey county, to the poor of such township and county. The claim was disallowed by appellant, and the claimants, M. Harlem & Son, appealed to the circuit court of the county. There the cause was tried by the court, and a finding was made for appellees in the sum of \$500.50, and, over appellant's motion for a new trial, judgment was rendered accordingly.

Errors are assigned here by appellant, which call in ques-

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tion the overruling (1) of its motion for a new trial and (2) of its motion to dismiss appellees' cause of action.

In the natural order, and, indeed, in the order in which appellant's counsel have presented and discussed these alleged errors, the error of the court in overruling its motion to dismiss appellees' cause of action herein must first be considered. This motion appears to have been in writing, and therein appellant moved the court to "dismiss this cause, as the evidence shows that the court has no jurisdiction over the subject-matter in controversy." In this same written motion, appellant also moved the court "to strike out from the evidence all the orders, offered in evidence, signed by Geo. D. Rowe, trustee." The rulings of the trial court on each of these motions have been elaborately discussed by appellant's counsel in their brief of this cause. Neither the motions nor the rulings of the court thereon have been made parts of the record of this cause, either by a bill of exceptions or by an order of court. The questions discussed by appellant's counsel, therefore, are not presented here for our consideration or decision by the second alleged error. Section 650, R. S. 1881; *Fryberger v. Perkins*, 66 Ind. 19; *Williams v. Potter*, 72 Ind. 354; *Shields v. McMahan*, 101 Ind. 591; *Kleespies v. Stute*, 106 Ind. 383.

We recognize the rule, however, that "the objection to the jurisdiction of the court over the subject of the action" is not waived by any failure to object or except, or to file a bill of exceptions on that ground. Section 343, R. S. 1881. But the "subject-matter in controversy," in the case in hand, was a claim against the county of Posey for necessary supplies furnished by appellees to the poor of such county, on the orders of the trustee of Black township therein. It will not do to say, we think, that the court below had "no jurisdiction over the subject-matter in controversy" herein. By the express provisions of sections 5758, 5759 and 5760, R. S. 1881, in force since May 31st, 1879, the board of commissioners of Posey county had exclusive original jurisdiction of appellees'

The Board of Commissioners of Posey County v. Harlem *et al.*

claim against such county. This is settled not alone by the plain letter of the statute, but, also, by our decisions. *Pfaff v. State, ex rel.*, 94 Ind. 529; *State, ex rel.*, v. *Board, etc.*, 101 Ind. 69; *State, ex rel.*, v. *Morris*, 103 Ind. 161.

In section 5769, R. S. 1881, also in force since May 31st, 1879, being section 3 of the same statute which gives the board of commissioners of each county in this State exclusive original jurisdiction of any claim against such county, it is provided as follows: "Any person or corporation, feeling aggrieved by any decision of the board of county commissioners, made as hereinbefore provided, may appeal to the circuit court of such county, as now provided by law."

In the case now before us, appellees' claim against Posey county was duly presented to the appellant for allowance; the claim was disallowed and rejected by appellant, and the appellees, feeling aggrieved by such decision, appealed therefrom to the circuit court of Posey county. Upon these facts shown by the record, there is no room for even a doubt, as it seems to us, of the full and complete jurisdiction of the court below over this suit and the subject-matter thereof.

On the trial of this cause, the court found the facts to be substantially as follows:

1. All the goods and money, mentioned in plaintiffs' bill of particulars, were furnished by them, upon the orders of George D. Rowe, trustee of Black township, in Posey county, and the goods were of the value charged therefor.

2. George D. Rowe was, at the time of drawing such orders, the duly elected and qualified trustee of Black township, and acting as such.

3. All the orders, numbered from 1 to 33 inclusive, were for money to be used for the purpose of defraying the expenses and transportation of certain persons to their homes in other counties of this State, or in other States.

4. In each of these cases, the trustee, as overseer of the poor, had made reasonable inquiry and found, and in good faith believed, such persons to be in need, and either sick or

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in distress, and furnished sums for transportation as being, in his judgment, the best mode of affording to them temporary relief.

5. Fraud never being presumed, the court found that the evidence did not show that any of the orders, either for goods, money or transportation, were issued either corruptly or fraudulently by said township trustee.

6. Upon and after examination and inquiry by said township trustee, all of the remaining orders were issued for goods, either to transient paupers or resident poor persons, who at the time were unable to provide for themselves and were found by said trustee to be in need of temporary relief.

7. Owing to the distance of the county asylum for the poor from Black township, and especially from Mt. Vernon where most of these persons were found, and the cost between \$3 and \$4 of conveying any one of such poor persons to the county asylum, the court found that it would have been inexpedient to have sent such persons to said asylum, or that there was no abuse of the discretion given to the township trustee, as overseer of the poor, in granting the persons mentioned, at their places of residence, the temporary relief afforded by him through his orders on the plaintiffs.

Upon the foregoing facts, the court concluded as matter of law that the appellant was justly and legally liable to appellees for the full amount of their claim herein. In this conclusion, we think there was no error.

The facts found by the court were fully and fairly sustained by the evidence, appearing in the record. In section 6066, R. S. 1881, in force since May 6th, 1853, the township trustees of the several civil townships of this State are designated as "overseers of the poor," within their respective townships, and are required to perform all the duties with reference to the poor therein, that may be prescribed by law. In section 6071, also in force since May 6th, 1853, it is provided that "The overseer of the poor in each township shall have the oversight and care of all poor persons in his town-

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ship so long as they remain a county charge, and shall see that they are properly relieved and taken care of in the manner required by law." So, also, in section 6078, of the same statute, it is further provided that "Whenever any person, entitled to temporary relief as a pauper shall be in any township in which he has not a legal settlement, the overseer of the poor thereof may, if the same be deemed advisable, grant such relief, by placing him or her temporarily in the poor-house of such county," etc. In section 6089, of the same act, it is made the duty of the overseer of the poor, on complaint to him that any person, not an inhabitant of his township, is lying sick therein or in distress, and without friends or money, so that he or she is likely to suffer, to examine into the case and grant such temporary relief as the nature of the same may require.

In construing the various provisions of our law for the relief of the poor, two things are plainly observable, namely: 1st. The legislative intention that the poor of each county and the transient poor shall, in any event, receive all necessary relief at the expense of the proper county; and 2d. The nature and extent of such relief, in each particular case, is largely entrusted to the sound discretion and practical judgment of the township trustee, as overseer of the poor. Orders were issued by the township trustee to the appellees, in the case under consideration, directing them to furnish the persons named therein the money or supplies which the township trustee had deemed it advisable to give such persons to relieve their necessities. Complaint is made by appellant's counsel, that the trial court erred in admitting these orders in evidence. Of course, the orders were not binding or conclusive upon either the township trustee or the county. But proof having been made *aliunde*, that the money or supplies, mentioned in the orders, had been furnished by appellees to the persons named therein, and that such persons were proper recipients of, and lawfully entitled to, the relief furnished by appellees upon such orders of the township trustee, we think

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that the orders were admissible in evidence as parts of the transaction. *Bloomington School Tp. v. National, etc., Co.*, 107 Ind. 43, and cases cited.

In *Commissioners, etc., v. Holman*, 34 Ind. 256, it is said: "The question as to the necessities of the persons relieved is a matter for the determination of the trustee, and we think if the people call competent and faithful persons to the discharge of the duties of this office, there will be little cause of complaint under this rule. Should there be connivance or fraud between the trustee and the claimant, this, of course, would present a different question." To the same effect, substantially, are the following cases: *Conner v. Board, etc.*, 57 Ind. 15; *Board, etc., v. Seaton*, 90 Ind. 158; *Board, etc., v. Jennings*, 104 Ind. 108.

Whether it will be better, in any case, to remove a resident poor person to the county asylum for the poor, as a permanent charge, or to afford him temporary relief merely, is also a question, we think, for the determination of the proper township trustee; and in the decision of this question he should take into consideration the best interests of the public, as well as those of such poor person. In the case at bar, the court expressly found that the dealings between the township trustee and the appellees were in good faith, and free from either fraud or corruption. Upon the whole case, as presented by the record, we are of opinion that the court committed no error herein, which will authorize or justify the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Nov. 3, 1886.

Spittorff v. The State.

No. 12,963.

SPITTORFF v. THE STATE.

CRIMINAL LAW.—Larceny.—Use of Word "Haul" Instead of "Carry" in Indictment.—The use of the word "haul" instead of the statutory word "carry" (section 1934, R. S. 1881), in an indictment charging that the defendant "did feloniously steal, take and haul away" certain personal property, will not render the indictment bad on motion to quash, the words being in one sense equivalent.

SAME.—Change of Venue from County.—Discretion of Court.—The refusal of a change of venue from the county is a matter wholly in the discretion of the trial court, in the absence of an abuse thereof.

SAME.—Bailiff of Grand Jury as Juror.—New Trial.—The fact that one of the jurors on the trial of an indictment was bailiff of the grand jury which returned it, and was accepted as a juror without knowledge of such fact until after verdict, is not ground for a new trial, unless it also appears that while acting as bailiff he was present during the deliberations of the grand jury, or was otherwise disqualified.

SAME.—Evidence.—Description of Stolen Property.—Production in Court.—On the trial of an indictment for larceny, the kind and quality of the property alleged to have been stolen, and subsequently found in the possession of one of the persons accused, may be described by the owner, without being produced in court, although such property is in the hands of the sheriff who had taken it on a search-warrant.

SAME.—Self-Serving Declarations.—Res Gestæ.—Statements of the accused, which are not a part of the *res gestæ*, but in the nature of self-serving declarations, are not competent evidence in his behalf.

From the Warrick Circuit Court.

J. B. Handy, C. W. Armstrong and J. B. Cockrum, for appellant.

W. A. Land, Prosecuting Attorney, for the State.

MITCHELL, J.—The appellant was convicted upon an indictment which charged that on a date mentioned, he and another, naming them, "did feloniously steal, take and haul away fifty pounds of tobacco, of the value of two dollars and seventy cents, the personal property, goods and chattels of," etc.

It is suggested that the indictment should have been quashed, because it does not pursue the statutory definition of the crime of larceny. Section 1934, R. S. 1881, enacts

108	171
130	400
108	171
125	308
136	606
108	171
144	206

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that "Whoever shall feloniously steal, take and carry, lead, or drive away the personal goods of another," shall be guilty of larceny. Departures from statutory definitions of crime, in all cases where such definitions aptly describe the offence, are not to be commended. The use of the word "haul" instead of "carry," which is the proper and better word, did not, however, render the indictment bad. One sense in which the word "haul" is properly used, is "to carry or convey in a cart or other vehicle."

The court refused the appellant's application for a change of venue from the county. This was a matter wholly within the discretion of the court. There is nothing in the record which raises an inference of abuse.

One of the grounds for a new trial was predicated upon an affidavit of the appellant, in which he deposed that H. H. Cain, one of the jurors who tried the cause, was bailiff to the grand jury at the term of court to which the indictment was returned, and that the fact that he was such bailiff was not known to the appellant when he accepted Cain as one of the triers, nor until after the verdict was returned.

There is no merit in this point. It is not stated in the affidavit, and it will not be presumed, that Cain, while acting as bailiff, was present during the deliberations of the grand jury; nor is there any suggestion in the affidavit that he was in any way disqualified from acting as an impartial juror in the trial of the case.

Mark Benton, whose property was alleged to have been stolen, was permitted, while testifying as a witness on behalf of the State, to describe the kind and quality of the tobacco lost by him, and subsequently found in the possession of one of the persons accused. This was eminently proper. It was not necessary that the stolen property should have been produced in court by the State, in order that testimony for the purpose of its identification, as the property of the witness, should be competent. That the tobacco had been taken upon a search warrant, and that it was in the custody of the sher-

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iff, did not alter the case. The appellant did not ask to have it produced in court.

The theory of the defence was, that the appellant had been hired by one Gladding, who was jointly indicted with him, to drive a team for Gladding at night. That he did so, going from place to place in the neighborhood during the night time, the latter getting tobacco from different barns, the appellant claiming that he was ignorant that the property was being stolen. The next day, when the stolen property was discovered, the appellant promptly admitted his connection with the matter, but claimed to be innocent of any knowledge that Gladding was not lawfully taking the property, which was being collected in the wagon which he was driving. A number of witnesses testified that the appellant had declared to them, in substance, as above stated. The defendant testified in his own behalf to the same effect, adding that when his suspicions became aroused during the progress of the affair, he was afraid of Gladding, who was armed with a loaded revolver.

In this state of the evidence, the appellant offered to prove that on the day following the larceny he went to the house of one of the persons from whom tobacco had been stolen the night before, and told the witness, by whom he offered to prove the facts, of the larceny by Gladding, and asked that the witness institute a prosecution against Gladding, and requested that he should subpoena the appellant as a witness, he proposing to testify to the facts in relation to the matter. This and other similar evidence was excluded. In this there was no error.

The appellant had the full benefit of repeated explanations made to different persons concerning his connection with the affair. That he manifested a disposition to instigate a prosecution against Gladding, and professed a willingness to testify to what he had already told a number of persons in relation to the matter, and his connection with it, did not, in our opinion, tend to demonstrate his innocence. At all events,

The *Ætna Life Insurance Company v. Buck et al.*

the excluded statements were no part of the *res gestæ*, but were in the nature of self-serving declarations, which were open to the suspicion of being part of a hastily formed plan of defence. They were not competent evidence. Whart. Crim. Ev., sections 690, 691.

The court also excluded the testimony of a witness by whom it was proposed to prove that Gladding offered to hire him, the witness, to drive the team for him, on the night of the larceny. We are unable to see how it would have benefited the appellant—assuming that he was duped by Gladding—if he had been permitted to show that the latter made an unsuccessful attempt to dupe another before he succeeded with him.

The appellant seems to have had the full benefit of his theory. That he failed to convince the jury of its truth may have been his misfortune ; it was not the fault of the court.

The judgment is affirmed, with costs.

Filed Oct. 30, 1886.

No. 12,795.

THE *ÆTNA LIFE INSURANCE COMPANY v. BUCK ET AL.*

MORTGAGE.—Married Woman.—Land Held in Virtue of Previous Marriage.—Mortgage During Second Coverture Void.—Descent.—A mortgage executed by a married woman during a second coverture, her husband joining, upon land held by her in virtue of a previous marriage, there being living children by the former marriage, is void under section 2484, R. S. 1881.

SAME.—Subrogation.—Satisfied Mortgage.—Taxes.—Voluntary Payment.—In such case, the mortgagee is not entitled to be subrogated to a valid mortgage which was paid off and satisfied, long before his mortgage was executed, with the proceeds of an intervening invalid mortgage, nor to the lien of the State for taxes voluntarily paid.

From the Montgomery Circuit Court.

108	174
124	246
108	174
142	239
108	174
146	403

108	174
156	570

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B. Crane, for appellant.

T. H. Ristine, for appellees.

Howk, C. J.—In this case the only error assigned here by appellant, the plaintiff below, is the sustaining of appellees' demurrers to its complaint.

Appellant alleged in its complaint that on, and for more than one year prior to, the 25th day of November, 1873, appellee Lavina Buck, then Lavina Hughes, widow, was the owner in fee simple, by descent from her deceased husband, James Hughes, who died seized thereof, of the undivided one-third part of certain described real estate, in Montgomery county, and that her co-appellees were the owners in fee simple, and tenants in common, of the undivided two-thirds part of such real estate, as the children and heirs at law of said James Hughes, who died seized thereof in 1864, intestate; that on the 25th day of November, 1873, appellee Lavina Hughes, widow, now Lavina Buck, borrowed of her co-defendant, Harrison McDaniel, the sum of \$200, and executed to him her note therefor, and a mortgage on her undivided interest in such real estate to secure the payment of such note, both of the date last named; that such mortgage was duly recorded on December 19th, 1873, in the recorder's office of such county; and that the mortgaged premises were the only property subject to execution the mortgagor had at the time the mortgage was executed, or at any time subsequent thereto, and that the \$200 were loaned solely on the security of such mortgage.

Appellant further alleged that afterwards, in 187—, appellee Lavina Hughes intermarried with her co-defendant, Samuel Buck, and at the September term, 1875, of the court below, she and her husband, Samuel Buck, commenced an action against the tenants in common with her of such real estate, for the partition thereof, according to their respective interests therein; and that such proceedings were afterwards had in such action as that on the 1st day of October, 1875, a de-

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cree of partition was duly rendered therein by such court, setting off to appellee Lavina Buck, in severalty, a certain described part of such real estate, containing 48.67 acres, as her share thereof; and that after such tenants in common and children were of full age, on April 29th, 1885, they and their respective husbands and wives, and said Lavina and Samuel Buck, executed a deed conveying such 48.67 acres of land to said David W. Hughes, one of such children, who accepted such deed with full knowledge of all the rights of the appellant and of all the facts, stated in its complaint herein.

Appellant also averred that on March 4th, 1879, the principal and interest on the note and mortgage, hereinbefore described, amounted to the sum of \$320, and were due and unpaid, and the taxes and other legal assessments on such 48.67 acres of land, amounting to \$100, were due, delinquent and unpaid, and a lien on such land, and on said day, for the purpose of raising the necessary money to pay off and satisfy the aforesaid mortgage, appellees Lavina and Samuel Buck executed to one Jane Gale, to secure a loan of \$500 made by her to said Lavina and Samuel Buck, a mortgage on such 48.67 acres of land; that such mortgage was duly recorded, on March 4th, 1879, in the recorder's office of such county; that such sum of \$500 was borrowed, and such mortgage was duly executed, by said Lavina and Samuel Buck, to raise the necessary money to pay the \$320, then due and owing on the McDaniel mortgage, and \$60 due and owing for taxes and assessments, which were a lien on such mortgaged lands; that out of said money at the request of said Lavina and Samuel Buck, Jane Gale paid the \$320 to said McDaniel, who at the time satisfied his mortgage on the record thereof, and she also paid the \$60 then due on such taxes and assessments.

Appellant further alleged that on the 10th day of March, 1881, the principal and interest on the note and mortgage, executed by Lavina and Samuel Buck to Jane Gale, amounted to the sum of \$600, which was due and unpaid, and taxes and other legal assessments on such 48.67 acres of land, amount-

The Aetna Life Insurance Company v. Buck *et al.*

ing to \$100, were due, delinquent and unpaid, and a lien on such land ; that on the day last named, for the purpose of raising the money to pay off and satisfy the Galey mortgage and such taxes and assessments, Lavina and Samuel Buck executed to the appellant a mortgage on such land to secure a loan of \$800, that day made by appellant to said Lavina Buck, and evidenced by the note of Lavina and Samuel Buck ; that such mortgage was recorded on March 14th, 1881, in the recorder's office of such county ; that at the request of Lavina and Samuel Buck, out of the money so borrowed by them, appellant applied the sum of \$600 to the payment and satisfaction of the Galey note and mortgage, and \$100 to the payment of such taxes and assessments ; that Lavina and Samuel Buck were then, and had been for fifteen years last past, wholly insolvent and possessed of no property subject to execution, except such land of Lavina Buck ; that all of the loans, mentioned in the complaint, were made upon the security of the mortgaged lands, and not upon the personal responsibility of either of the mortgagors ; and that Samuel Buck executed the notes and mortgages, as the surety of his wife, and received none of the money ; and that the notes executed to appellant were due and unpaid.

The other appellees were made defendants, on the ground that they claimed to have an interest in the mortgaged lands, adverse to that of appellant, and appellant averred that their interest was junior and inferior to its mortgage lien. Wherefore, etc.

It is very clear that the mortgage, executed by Lavina and Samuel Buck to appellant, was absolutely void, and can not be enforced. The complaint shows that Lavina held the real estate, described in such mortgage, in virtue of her previous marriage with James Hughes, and that there were children alive by such marriage. The mortgage to the appellant, therefore, was executed by Lavina and her then husband, Samuel Buck, during her second or subsequent marriage, in

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direct contravention of the express provisions of section 18 of the act of May 14th, 1852, regulating descents, etc., as such section is amended by an act which became in force May 31st, 1879. Section 2484, R. S. 1881; *Vinnedge v. Shaffer*, 35 Ind. 341; *Smith v. Beard*, 73 Ind. 159; *Connecticut M. L. Ins. Co. v. Athon*, 78 Ind. 10; *Wright v. Wright*, 97 Ind. 444.

For the same reasons and upon the same authorities, it must be held, also, that the mortgage to Jane Galey, mentioned in appellant's complaint, was void and could not have been enforced.

But it is claimed by appellant's counsel, and on this claim the case is chiefly rested in this court, that the McDaniel mortgage was valid and legal, and that appellant ought to be subrogated to that mortgage and the right to foreclose it. That mortgage was paid off and satisfied long before appellant made its loan and took its mortgage on the faith of the apparent title of Lavina Buck to the mortgaged land; and it is not claimed that any of appellant's money was ever applied by any one to the payment and satisfaction of the McDaniel debt and mortgage. There is no equitable ground, therefore, upon which appellant's claim to be subrogated to the McDaniel mortgage can be sustained. *Ritter v. Cost*, 99 Ind. 80; *Catterlin v. Armstrong*, 101 Ind. 258; *Birke v. Abbott*, 103 Ind. 1 (53 Am. R. 474). Nor can appellant's claim for subrogation to the lien of the State, for taxes and assessments voluntarily paid, be sustained upon either principle or authority.

The demurrers to the complaint herein were correctly sustained.

The judgment is affirmed, with costs.

Filed Nov. 6, 1886.

The Cincinnati, Hamilton and Indianapolis Railroad Co. v. McDougall.

No. 12,622.

THE CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD COMPANY v. McDOUGALL.

RAILROAD.—*Service of Summons.*—*Omission of Christian Name of Conductor not Ground for Quashing Sheriff's Return.*—Service on a railroad company is had in compliance with the statute, R. S. 1881, section 4027, when a copy of the summons is delivered to a conductor on any train on the road passing into or through the county. The omission of the Christian name of the conductor is not ground for quashing the sheriff's return.

SAME.—*Name of Corporation.*—The designation of the defendant in the complaint as "The Cincinnati, Hamilton and Indianapolis Railroad Company," sufficiently indicates that the defendant is a corporation.

SAME.—*Action for Stock Killed.*—*Liability of Corporation Owning Line.*—Under the statute, R. S. 1881, section 4025, a railroad corporation is liable for stock killed on its line at a point where it has failed to securely fence its track, whether the railroad is operated by the company owning the line, or by another.

SAME.—*Evidence as to Corporation and Liability.*—Evidence that an animal was injured upon the track of a railway known as the Cincinnati, Hamilton and Indianapolis Railroad, a branch of the Cincinnati, Hamilton and Dayton Railroad, sufficiently indicates that the former is a corporation by that name, and presumptively liable for the injury.

EVIDENCE.—*Tax Assessments.*—*Value of Property.*—Assessment lists for taxation are not competent evidence either for or against the lister, to establish the value of property for purposes other than taxation; especially so where it is sought to arrive at the value of one article by proving the value of others with which that in question was listed.

From the Marion Circuit Court.

R. W. Marshall, A. C. Harris and W. H. Calkins, for appellant.

C. G. Offutt and R. A. Black, for appellee.

MITCHELL, J.—McDougall sued the railroad company for damages for killing his horse. He alleged in his complaint that the horse strayed upon the railroad track at a point where it was not securely fenced, and was run over and injured by the defendant's engine and cars.

A summons was issued, upon which the sheriff returned that service thereof had been made upon the defendant,

108	179
137	151
108	179
132	38
108	179
134	599
108	179
159	87
150	88
108	179
163	558
108	179
164	451
108	179
108	474

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naming it, by reading and delivering a certified copy "to — Schindler, a conductor on train No. 39, a regular passenger train running on said company's railroad."

The appellant insists that the court erred in overruling a motion to quash the sheriff's return to the summons, the objection being, that it omits the Christian name of the conductor. There is no merit in this point. Section 4027, R. S. 1881, authorizes summons to be served "by copy, on any conductor on any train on said road passing into or through said county."

Service in compliance with the statute is had, when a copy of the summons is delivered to a conductor on any train of the railroad passing through or into the county. It is not essential that the sheriff should ascertain and accurately state the full name of the conductor.

The point is also made that, because the complaint does not allege that the appellant was a corporation, or that it or any assignee, lessee, or other person, was operating its railroad, a demurrer for want of sufficient facts should have been sustained to the complaint.

The appellant was designated in the complaint as "The Cincinnati, Hamilton and Indianapolis Railroad Company." This sufficiently indicated that the defendant was a corporation. *Johnson v. State*, 65 Ind. 204, and cases cited; *Norton v. State*, 74 Ind. 337; *Franklin v. State*, 85 Ind. 99.

Section 4025, R. S. 1881, makes any railroad corporation, lessee, assignee, receiver or other person or corporation running, controlling, or operating any railroad, liable jointly or severally for stock killed. Under this statute it is immaterial whether the railroad is operated by the company owning the line or by another. A railroad corporation is liable for stock killed on its line, in the event it has failed to securely fence its track. *Indianapolis, etc., R. R. Co. v. Ray*, 51 Ind. 269.

Moreover, the complaint avers that "the defendant, by and with her locomotive engine and cars, then and there operated,

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run and controlled by the defendant's servants and employees, struck, run against," etc. This averment very clearly indicates that the train was being operated by the appellant.

Under the assignment that the court erred in overruling appellant's motion for a new trial, counsel contend there was no sufficient or competent evidence to establish the fact that the appellant was a corporation, or that it operated the engine and train of cars, which inflicted the injury upon the appellee's horse.

The evidence was to the effect that the horse was injured upon the track of a railway, which was known as the Cincinnati, Hamilton and Indianapolis Railroad, a branch of the Cincinnati, Hamilton and Dayton Railroad. *Prima facie*, this indicates a corporation of that name. It was sufficient to raise such an inference. The animal having been injured, as the proof showed, by a train run upon the track of that railroad, the appellant was presumptively liable for the injury. *Evansville, etc., R. R. Co. v. Snapp*, 61 Ind. 303.

The plaintiff, while testifying as a witness in his own behalf, was inquired of, on his direct examination, as to the value of the horse killed. He declined to fix the value, or express any opinion on that subject.

The appellant, on cross-examination, sought to show that the horse whose value was in question, with five others owned by the appellee, had been listed by him, and returned to the assessor, at a valuation of three hundred dollars. The court sustained objections to all questions which were designed to elicit these facts.

Subsequently, the appellee was recalled by the appellant, and after admitting the genuineness of his signature to the assessment list shown him, he was inquired of concerning the value of the five other horses, listed and returned with the one afterwards killed.

It was proposed to show that the five were worth at least two hundred and fifty dollars. The evidence was excluded.

The Cincinnati, Hamilton and Indianapolis Railroad Co. v. McDougall.

There was no error in this ruling. As against the lister, assessment lists are competent evidence to show whether or not the particular property in controversy was claimed or owned by him at the time the list was made. *Lefever v. Johnson*, 79 Ind. 554; *Painter v. Hall*, 75 Ind. 208.

Such lists are, however, not competent, either for or against the lister, as original, substantive evidence, to establish the value of a particular article of property for purposes other than taxation. Such valuations are to be regarded as having been made for a special purpose, and like admissions made for a like purpose, they are not competent as original evidence of value for any other than the purpose for which they were made, or in a case involving the question of valuation for taxation. *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 279; *Randidge v. Lyman*, 124 Mass. 361; *Commonwealth v. Heffron*, 102 Mass. 148; *Stanfield v. Stiltz*, 93 Ind. 249.

This is especially so in a case where it is sought to arrive at the value of one article, by proving the value of others with which that in question was listed.

Whether the circumstances justified the ruling in *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247, we need not determine. The rule as above stated seems to be well supported, and is applicable to this case.

Without determining whether or not it is competent to impeach a witness who has sworn to the value of property, by the introduction of his tax list, in which he valued the property for taxation at a sum less than that testified to, we are clear the witness in this case having fixed no value on the horse, it was not competent to arrive at its value in the manner proposed.

The best evidence of the value of the horse was the testimony of witnesses who had knowledge of its value at or about the time it was killed.

Conceding the appellant's claim, that it was incumbent on the plaintiff below to show affirmatively that the horse came

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upon the track at a point where it was the duty of the railroad company to maintain a fence, there was evidence from which this may have been inferred. There was no error.

The judgment is affirmed, with costs.

Filed Oct. 8, 1886; petition for a rehearing overruled Nov. 6, 1886.

No. 12,112.

SPENCER v. SLOAN.

PROMISSORY NOTE.—Indorsement by Payee.—Qualification by Parol.—Indorsement to Evidence Payment.—In an action by the holder of a promissory note against the payee on his indorsement thereof, the latter may show by parol that when he put his name upon the back of the note it had already been paid, and that his name was written thereon at the request of the plaintiff as evidence of payment.

SAME.—Collateral Security for Previous Debt.—Consideration.—An existing previous debt constitutes a sufficient consideration for the pledge of collateral paper as security for its payment.

From the Marion Superior Court.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.
W. W. Herod, for appellee.

NIBLACK, J.—This was an action by Benjamin F. Spencer, as the holder, against William Sloan, as endorser, of a promissory note executed by one Milton Spencer to the said Sloan on the 10th day of July, 1868, for \$405, and payable two days after date.

The complaint alleged the insolvency of Milton Spencer at the time of, and ever since, the assignment of the note.

The defendant answered in seven paragraphs, but he afterwards withdrew the first and second paragraphs, and a demurrer having been sustained to the fourth paragraph, only the third, fifth, sixth and seventh paragraphs remain in the record.

108	183
134	15

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To these third, fifth, sixth and seventh paragraphs of answer demurrers were filed at the proper time and afterwards overruled.

The third paragraph averred that at the time the note in suit was executed Milton Spencer, the maker thereof, and the plaintiff were partners in business; that the defendant loaned such partners the sum of \$405, and as evidence of the debt thereby created, took the note in question under the belief that it was signed by both of said partners; that a certain railroad bond of the real and face value of \$1,200 was at the same time delivered to him, the defendant, as collateral security for the payment of said note; that after the maturity of said note, and by the direction of the plaintiff and the said Milton Spencer, he surrendered the same to one Thomas A. Goodwin, who paid him the full amount due upon such note; that, at the request of the said Goodwin, he, the defendant, endorsed his name upon the note as evidence that it had been paid, and for no other purpose; that for the reasons given he never sold or transferred the note to any other person.

The fifth paragraph alleged that prior to the execution of the note sued on, the plaintiff, to induce the defendant to loan to the said Milton Spencer the sum of \$405, agreed to put up a certain railroad bond of the value of \$1,000 as collateral security therefor; that the said loan was accordingly made and the note described in the complaint executed; that said bond was thereupon delivered to the defendant as such collateral security; that when, in October, 1868, the defendant transferred the note to the plaintiff, he also transferred to him the bond, which was amply sufficient to pay the note, but that the latter had either sold or lost said bond, and converted the same to his own use without taking any steps whatever to subject such bond to the payment of the note; that at the time said note was transferred to the plaintiff, the said Milton Spencer was hopelessly and notoriously insolvent, as the plaintiff well knew, and has ever since so continued to be.

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The sixth paragraph asserted that the note herein described was given by Milton Spencer, the maker, in consideration of a loan of \$405; that at the time of the execution of the note, he, the said Milton Spencer, placed in the hands of the defendant a certain railroad bond of the value of \$1,000 to secure the payment of said note; that the defendant accepted and held said bond as such security until in October, 1868, when he transferred said bond and note to the plaintiff; that the plaintiff thereafter sold or destroyed said bond without making any effort to subject the same to the payment of said note, whereby said bond as a security for such payment has become lost; that the said Milton Spencer was at the time of such transfer wholly insolvent as the plaintiff well knew.

The seventh paragraph stated that the plaintiff is a brother of the said Milton Spencer, the maker of the note declared on, and that to secure the payment of said note he delivered to, and placed in the hands of, the defendant a certain railroad bond of the face and actual value of \$1,000; that afterwards, to redeem said bond, the plaintiff paid off and discharged said note; that thereupon the defendant surrendered to him said note and bond; that after the note and bond had been so surrendered to him, the plaintiff asked the defendant to put his name on the back of the note to show that it had been paid by him and not Milton Spencer, and that for that purpose, and for no other, the defendant did put his name on the back of the note; that consequently the defendant did not sell, assign or transfer the note to the plaintiff.

The plaintiff replied in five paragraphs, but afterwards withdrew all but the fifth paragraph. This latter paragraph was addressed only to the fifth and sixth paragraphs of the answer, and averred that the note endorsed by the defendant, as charged in the complaint, was executed as evidence of a prior indebtedness of Milton Spencer, the maker of such note, to the defendant, and payable long before the time of the execution of such note, and for no other consideration whatever; that the bond, referred to in said fifth and sixth para-

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graphs of the answer, was always the property of the plaintiff, and hence never belonged to the said Milton Spencer, either in whole or in part, all of which was fully known to the defendant at the time said bond came into his possession and at the time he assigned the note to the plaintiff; that the loan of money to Milton Spencer was not made, nor was the note executed, on the faith of such bond; that such bond was not delivered to the defendant until long after the execution of the note, and then only as collateral security for the prior existing debt, evidenced by the note. Wherefore the plaintiff averred that there was no consideration to support the pledge of said bond to the defendant as collateral security for the payment of said note; that the surrender of said bond by the defendant to the plaintiff constituted a relinquishment of all the former's alleged right to have the same held as collateral security for the indebtedness represented by said note.

A demurrer was sustained at special term to this paragraph of reply, and, the plaintiff declining to plead further, final judgment was rendered against him for want of a reply, and that judgment was affirmed at general term.

On behalf of the plaintiff below, it is claimed that the endorsement of a promissory note constitutes a certain and well defined contract, with as much force and meaning as if all the conditions and stipulations had been written out at full length, and that hence parol evidence is inadmissible to either modify or contradict such a contract of endorsement, and the case of *Stack v. Beach*, 74 Ind. 571 (39 Am. R. 113), is relied upon as supporting that doctrine. But the doctrine as thus stated was in that case only made to apply to endorsements upon a note or bill, which regularly follow that of the payee, and as to that class of endorsements many exceptions to the general rule announced were recognized. So far as we are advised, so strict a rule has never been applied to endorsements upon a note or bill by the payee.

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It is true that where the law attaches a definite meaning to an endorsement upon a note or bill, parol evidence will not be admitted to qualify or contradict the contract of endorsement, but this rule for the exclusion of parol evidence does not extend to evidence offered to attack the validity of the contract itself for want of consideration, or on account of fraud, or because the consideration has failed; so the fact that it would be inequitable or fraudulent to enforce the contract of endorsement, as that the endorser was an agent, or that the note was endorsed for a special purpose, such as the creation of a trust, or for collection, or for the accommodation of the endorsee, may be proved by parol. Edwards Bills and Notes, sections 393, 399, 400, 442; 3 Kent Com., p. 80.

In the case of *Smythe v. Scott*, 106 Ind. 245, it was said that, "Where an endorsement is made by a payee without consideration, or upon some trust arising out of an antecedent transaction, or to accomplish some special purpose, the facts which go to show the transaction may be shown. This, for the purpose of showing the equities between the parties, and to determine the consideration upon which the endorsement was made."

From what has been said, the inference would seem to be plain that the defendant was entitled to show that when he put his name on the back of the note, it had already been paid, and that his name had been so put on the note at the request of the plaintiff as evidence of such payment. It follows that there was no error in overruling the demurrers to the third and seventh paragraphs of the answer. Daniel Neg. Inst., sections 710, 711.

In support of the sufficiency of the fifth paragraph of the reply, it is further claimed that the pre-existing debt of Milton Spencer did not afford a sufficient consideration for the delivery of the railroad bond to the defendant as collateral security for the payment of the note; that for that reason the defendant had no lawful right to retain the bond, and, therefore, when he surrendered it to the plaintiff, it was simply

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a return of the bond to its lawful owner without any encumbrance upon it.

Whether a previous debt is sufficient to constitute a holding for value of collateral paper, is a question upon which there has been a very sharp conflict of authority in this country ever since the case of *Bay v. Coddington*, 5 Johns. Ch. 54, was decided by Chancellor Kent. That case, in effect, declared that a previously existing debt did not constitute a sufficient consideration for such a holding of collateral paper, and the doctrine of that case has obtained full recognition in a large number of the States. But the Supreme Court of the United States has uniformly held a contrary doctrine. In the case of *Swift v. Tyson*, 16 Peters, 1, this latter court declined to follow the case of *Bay v. Coddington*, *supra*, and has ever since continued to dissent from the rule recognized in that case. See Jones Pledges, section 107, *et seq.*; also, *Bank of the Metropolis v. New England Bank*, 1 How. 234; *Goodman v. Simonds*, 20 How. 343; *McCarty v. Roots*, 21 How. 432; *Oates v. Nat'l Bank*, 100 U. S. 239; *Railroad Co. v. Nat'l Bank*, 102 U. S. 14.

It may, therefore, be now regarded as an established legal proposition in the Supreme Court of the United States, that an existing debt affords a sufficient consideration for the pledge of collaterals as security for its payment, and that seems to be in accord with the English decisions on the same subject. See, again, Jones Pledges, section 111, and authorities cited.

This court in the case of *Straughan v. Fairchild*, 80 Ind. 598, accepted the rule of construction thus established by the Supreme Court of the United States as the correct rule under the laws of this State, and, still adhering to that rule as being more in the interest of commerce and of fair dealing than the contrary doctrine, we are brought to the conclusion that the court below at special term did not err in sustaining a demurrer to the fifth paragraph of the reply.

The judgment at general term is affirmed, with costs.

Filed Nov. 6, 1886.

The City of Evansville et al. v. Summers.

No. 13,386.

THE CITY OF EVANSVILLE ET AL. v. SUMMERS.

CITY OF EVANSVILLE.—Special Charter.—Amendment.—The special charter granted to the city of Evansville in 1847, may be amended by special or general acts.

SAME.—Street Improvement.—Payment of Part of Cost Out of City Treasury.—Section 58 of Charter not Repealed by Act of 1885.—Section 58 of the special charter of the city of Evansville, as amended in 1881 (Acts of 1881, p. 22), providing that such city may pay a part of the cost of street improvements out of its treasury, is not repealed or affected by the general act of April 13th, 1885 (Acts of 1885, p. 207).

STATUTES.—Construction.—Rules.—Intention of Legislature.—In the construction of statutes the prime object is to ascertain and carry out the purpose of the Legislature in their enactment, and to do this the words used must be first considered in their literal and ordinary signification, but the courts may go beyond such meaning of the words, and look to other statutes upon the same subject, to the objects contemplated, the evils to be corrected, and the remedy provided.

From the Vanderburgh Superior Court.

J. B. Rucker, for appellants.

R. D. Richardson and *J. T. Walker*, for appellee.

ZOLLARS, J.—The city of Evansville has never adopted the general law for the incorporation of cities, but has a special charter, granted in 1847.

In the fourth clause of the schedule, which is annexed to, and forms a part of, the Constitution of 1851, it is provided that "All acts of incorporation for municipal purposes shall continue in force under this Constitution until such time as the General Assembly shall, in its discretion, modify or repeal the same."

That the special charter, thus granted and retained, may be amended by special or general acts, is not here questioned, and is well settled. *Longworth v. Common Council of Evansville*, 32 Ind. 322; *Warren v. City of Evansville*, 106 Ind. 104; *City of Evansville v. Bayard*, 39 Ind. 450; *Eichels v. Evansville Street R. W. Co.*, 78 Ind. 261 (41 Am. R. 561); *Chamberlain v. City of Evansville*, 77 Ind 542.

108	189
185	461
108	189
130	443
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131	116
108	189
134	44
135	529
136	571
108	189
139	218
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141	189
141	516
108	189
146	359
108	189
151	529

108	189
169	484

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As amended in 1881, Acts 1881, p. 22, the 58th section of the special charter confers authority upon the city to improve the streets, alleys and sidewalks, either upon petition by the abutting lot-owners, or by a vote of two-thirds of all the members of the common council, and to assess the expense and cost of such improvements upon the lots, or parts of lots, fronting, abutting or adjoining such improved street or alley, and to enforce the collection of such assessments by a sale of the lots, in the manner provided, or by an action to enforce the lien of the assessments, etc. When the improvements are made upon contract, the contractor accepts the assessments as so much money, and enforces the collection of them by the remedies above stated.

In that section there is this proviso: "*Provided, further, That the city of Evansville may pay out of its treasury a half of the cost and expenses of such improvements or repairs other than sidewalks and alleys; and in the event it elects so to do, the other half of such costs and expenses shall be assessed and charged on all lots or parts of lots abutting or adjoining as aforesaid; and the provisions of this act, including remedies, shall govern any improvements or repairs made hereunder, whether the same be charged in whole or in part against the lots or parts of lots abutting or adjoining as aforesaid.*"

By a general ordinance, passed in May last, it was ordained that thereafter the cost of street improvements, such as may be made under the foregoing amended section of the charter, should and shall be paid, one-third by the city and two-thirds by the abutters, with this proviso: "*Provided, however, that the city shall pay for street intersections, and this ordinance shall not apply to sidewalk improvements, nor where the only improvement made is the grading of the street.*"

Subsequent to the passage of the above general ordinance, the common council passed an ordinance for the improvement of certain streets, and entered into a contract with the city's co-appellants herein for the doing of the work.

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Appellee instituted this action to enjoin the city authorities from paying the one-third of the cost of the improvements out of the general fund of the city.

It is conceded, that under the above mentioned section of the city charter, such payment might lawfully be made, but it is contended, that that section has been superseded and repealed by a general law enacted in 1885. Acts 1885, p. 207.

That contention presents the controlling question in the case. The title of the act of 1885 is "An act concerning contracts made by order of the common council of cities for the grading and improvement of streets and alleys, providing the manner of estimating the cost thereof and of enforcing the same against the lots and unplatted lands abutting on such streets or alleys, fixing the liability therefor, and declaring an emergency."

The act, so far as need be set out in full, is as follows: "Be it enacted, * * * That in all contracts * * hereafter made by order and under the direction of the common council of any city in this State for the grading, paving, guttering and improvement of any street or alley in such city, the cost of such improvements shall be estimated according to the whole length of the street or alley, or the part thereof to be improved, per running foot; and the city shall be liable to the contractor for so much thereof only as is occupied by public grounds of the city bordering thereon, and the crossing of streets and alleys; and the owners of lots bordering on such street or alley or the part thereof to be improved, shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of lots owned by them to the whole improved line."

Does this act repeal that portion of the above section of the special charter of the city of Evansville, which authorizes the payment of one-third of the cost of such improvements out of the city treasury, if the common council shall so determine?

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Did the Legislature so intend in the enactment of the statute?

In the construction of statutes, the prime object is to ascertain and carry out the purpose of the Legislature in their enactment. To do this, the words used in the instrument should be first considered in their literal and ordinary signification, but it is often necessary to inquire beyond such meaning of words.

In the case of the *City of Valparaiso v. Gardner*, 97 Ind. 1 (6) (49 Am. R. 416), in speaking of the rules of construction, this court said: "While it is our duty to yield to the words of the Constitution, still, in determining what meaning they were intended to have, it is proper to consider the circumstances under which the provision was adopted, and the object it was intended to accomplish. Cooley Const. Lim. (5th ed.), 78, 79."

In the case of *Maxwell v. Collins*, 8 Ind. 38, it was said: "It is a settled rule of interpretation of statutes, that the application of the words of a single statute may be enlarged or restrained to bring the operation of the act within the intention of the Legislature, when violence will not be done by such interpretation to the language of the statute."

In the case of *Taylor v. Board, etc.*, 67 Ind. 383 (384), it was said: "It is a settled principle that, in construing a statute, the intention of the Legislature must govern. To ascertain this intention, we must look to the letter of the statute, to other statutes upon the same subject, * * * to their spirit and purpose, and harmonize what may appear to be conflicting, so as to bring them into concord with a general and uniform system."

In the case of *Prather v. Jeffersonville, etc., R. R. Co.*, 52 Ind. 16, it was said: "So in case of doubt or uncertainty; acts *in pari materia*, passed before or after, and whether repealed or unrepealed, may be referred to in order to discern the intent of the Legislature in the use of particular terms; and, within the same rule and the reason of it, contempora-

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neous legislation, although not precisely *in pari materia*, may be referred to for the same purpose."

And in the case of *State, ex rel., v. Forkner*, 70 Ind. 241, it was said: "The chief thing to be explored is the intention. This the judiciary is to seek in the history of legislation; in the objects contemplated, the evils to be corrected, and the remedies provided."

And so, in the case of *State v. Canton*, 43 Mo. 48, it was said: "It is an established rule, applicable to the construction of all remedial statutes, that cases within the reason, though not within the letter of a statute, shall be embraced by its provisions; and cases not within the reason, though within the letter, shall not be taken to be within the statute."

See, also, the cases of *Middleton v. Greeson*, 106 Ind. 18, and the numerous cases there cited; *Stout v. Board, etc.*, 107 Ind. 343; *Miller v. State, ex rel.*, 106 Ind. 415; *Storms v. Stevens*, 104 Ind. 46.

Keeping in view the well settled rules of construction, as announced in the foregoing cases, must we determine that it was the intention of the Legislature, by the act of 1885, to overthrow that portion of the special charter of Evansville, which gives discretion to the common council to pay out of the city treasury one-third of the cost of street improvements?

Section 69 of the general law for the incorporation of cities, as enacted in 1867, provided, that in the improvement of streets, the city should be liable to the contractor for so much of the improvement only as was occupied by public grounds of the city bordering thereon, and the crossings of streets and alleys, and that the owners of lots bordering on such streets and alleys, or the part thereof to be improved, should be liable to the contractors for their proportion of the costs, in the ratio of the first line of the lots owned by them, to the whole improved line. 1 R. S. 1876, p. 303.

Under that section, a lot could not be assessed unless it

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abutted upon the street, although but a narrow strip of land might separate it from the street.

That section was amended in 1881, so that the assessments might be extended upon lots and land back to the distance of fifty feet from the front line, whether such ground should be subdivided by platting or conveyance, or in any other manner, etc. Acts 1881, p. 392; R. S. 1881, section 3163.

The above act of 1885, although it does not purport upon its face to be an amendment of the above section 69, as amended in 1881, covers and embraces the same subject-matter, enlarges the authority, so that lots and unplatted lands may be assessed back to the distance of one hundred and fifty feet from the front line, and provides a mode of collection by suit, etc.

Section 69 above, the amendment thereof in 1881, and the act of 1885, each and all, fix a limit to the liability of the city to the contractor, but neither of them fixes, or attempts to fix, a limit upon the authority of the common council of the city to pay for a part of the improvements out of the general funds of the city, if, in the judgment of the common council, such payment is admissible.

Section 70 of the general law for the incorporation of cities, 1 R. S. 1876, p. 304, authorizes the common council, if they deem it just and right, to pay a part or the whole of the cost of street improvements out of the general revenue of the city.

That section, conferring authority to pay for street improvements out of the general revenue, is in no way affected by the act of 1885, which limits the liability of the city for such improvements. As the law now stands, therefore, cities incorporated under the general law are liable to a limited extent, but have authority to pay out of the general revenue to the extent of the entire cost of street improvements. In these regards, they occupy the same position which they did before the passage of the act of 1885. And thus, while the act of 1885 does not purport to be an amendment of the

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amended section 69, it subserves the same purpose. It was evidently intended to take the place of that section.

The above amended section 58 of the charter of Evansville also fixes a limit to the liability of the city to contractors for street improvements. Under that section, the city may assess the cost of the improvements upon the abutting lots, and is not liable for the amount so assessed. The contractor takes the assessments in lieu of so much money, and may collect them by the sale of the lots upon proper notice, in the mode provided, or by an action to enforce the lien, etc.

And what is provided by section 70 of the general law for the incorporation of cities, in the way of authority to pay for street improvements out of the general revenues, is provided for the city of Evansville in the above proviso in section 58 of its charter. And thus, both the cities incorporated under the general law, and the city of Evansville, under the above section of its charter, have authority to pay for street improvements out of the general revenues of the city. The only difference is, that the one class may thus pay the whole of the cost, while Evansville may not so pay to exceed the one-half of the cost of such improvements.

To hold that the above act of 1885 so repealed the whole of the above amended section 58 of the Evansville charter, as to take from that city the right to pay a part of the cost of street improvements out of the general revenues, would be to place that city upon narrower grounds than are occupied by cities incorporated under the general law.

In our judgment, the act of 1885 was not intended to so apply to the city of Evansville as to take from it the authority to pay a part of the cost of street improvements out of the general revenue of the city. It does not purport to be a repeal of any portion of the Evansville charter; and if it should be held that it in any way applies to that city, it would not follow that it would repeal that portion of the amended section 58 of its charter, which gives the city au-

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thority to pay a part of the cost of street improvements out of the general revenue.

It did not destroy the authority of other cities to so pay out of the general revenue, nor did it destroy the like authority of the city of Evansville.

If it should be held to apply to that city, and to any extent repeal the amended section 58 of its charter, the repeal would be such only as results by implication. Such repeals are not favorites of the law, and will take place only to the extent that the new law is in irreconcilable conflict with the prior law. *Spencer v. State*, 5 Ind. 41; *Blain v. Bailey*, 25 Ind. 165; *Coghill v. State*, 37 Ind. 111; *Water Works Co., etc., v. Burkhart*, 41 Ind. 364, 380.

As we have said, the act of 1885 continues the limitation upon the liability of cities, and enlarges the power of assessing for street improvements, but it in no way limits, or undertakes to limit, the authority of cities to pay for street improvements out of the general revenues of the city. There is nothing in the act at all, directly or indirectly, in conflict with that portion of the amended section 58 of the Evansville charter which authorizes the city to pay a part of the cost of street improvements out of the general revenues of the city.

Our judgment upon the whole case is, that the act of 1885 was not intended to, and did not repeal or affect the amended section 58 of the Evansville charter, and that, therefore, the court below erred in overruling appellant's demurrer to appellee's complaint.

Judgment reversed, at appellee's cost, and cause remanded, with instructions to the court below to sustain the demurrer to the complaint.

Filed Nov. 6, 1886.

Hunter v. Pfeiffer *et al.*

No. 12,709.

HUNTER v. PFEIFFER ET AL.

PLEADING.—*Demurrer.*—*Amendment.*—*Filing New Paragraph.*—*Waiver of Exceptions.*—Where, upon the sustaining of a demurrer to his complaint, the plaintiff, without obtaining leave to amend, files what he styles another paragraph, setting up substantially the same facts as were contained in the original complaint, the new paragraph will be treated as an amended complaint, superseding that demurred out, and waiving exceptions to the rulings thereon.

CONTRACT.—*Competitive Bidding on Public Works.*—*Agreement to Forbear.*—*Fraud.*—*Partnership.*—*Public Policy.*—No enforceable right can be predicated upon an agreement of partnership, the effect of which is to stifle or diminish competitive bidding on public works and to perpetrate a fraud on public officers.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

W. P. Rhodes, for appellees.

MITCHELL, J.—Hunter commenced a suit against Pfeiffer and two others in the Warren Circuit Court. His complaint was in two paragraphs. The court sustained a demurrer to the complaint, to which ruling the plaintiff below excepted. Thereupon he filed what is styled a third paragraph of complaint, which sets up substantially the same matters as were contained in the original complaint. Subsequently the court sustained a demurrer to this so-called third paragraph. The appellant, by proper assignments, now asks a review of the rulings of the court on all the paragraphs of his complaint.

Section 342 of the code provides, in substance, that when the court sustains a demurrer to a pleading, the party affected by such ruling may amend upon such terms as the court may direct, upon payment of the costs occasioned by the demurrer.

In case the court sustains a demurrer to an entire complaint or pleading, and no leave to amend is asked or obtained, it becomes the duty of the court to render the proper judgment upon the demurrer. Bicknell Prac. 107.

If, without obtaining leave to amend, a fresh complaint is

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filed, the *gravamen* of which is the same as that demurred out, it will be treated as an amendment, and will be regarded as having superseded the original complaint.

Without considering what would be the effect of filing an additional paragraph counting upon a different cause of action, we are clear that a plaintiff, to whose complaint a demurrer has been sustained, waives his exception to such ruling by filing another complaint in the same case, based upon substantially the same facts.

The orderly and, in our opinion, the only proper course allowable under the statute, when a demurrer is sustained to an entire complaint, is, either to stand by the demurrer, or to ask and obtain leave to amend. Whether leave to amend is asked and obtained or not, the section of the statute above referred to can not be avoided, by filing a new complaint embracing substantially the same cause of action as that already demurred out, and styling such new complaint an additional paragraph, instead of an amended complaint.

Where a demurrer has been sustained to a pleading, any other pleading subsequently found in the record, which presents substantially the same cause of action or defence, will be regarded as having been filed by leave of court as an amendment, and will be treated as having superseded the pleading, or paragraph thereof, which it amends. This, too, without regard to the manner in which the subsequent pleading is entitled. *Trisler v. Trisler*, 54 Ind. 172; section 650, R. S. 1881.

The third paragraph, or amended complaint, which we now proceed to consider, presents, in substance, the following facts: On the 5th day of February, 1885, Hunter, Pfeiffer and two others entered into an agreement to form a partnership, the purpose of which was to secure the contract for building a free gravel road, the construction of which, we may infer from the complaint, had been duly determined upon by the board of commissioners of Warren county. The arrangement was, that Pfeiffer should attend the letting, which had been ad-

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vertised, and bid for the work and secure the contract, and that Hunter and his associates should become sureties on the bond required by law in that behalf to be given by the contractor.

Pfeiffer bid off and was awarded the contract at the price of \$13,465. The contract for the work was duly executed by the board to Pfeiffer. Hunter and the other two signed his bond according to the agreement. The plaintiff avers that the contract between Pfeiffer and the board is worth \$3,000; that \$10,000 is more than sufficient to execute the work according to the agreement.

It is further averred, that but for the alleged agreement of partnership, the plaintiff would have bid for and received the contract, and would have made \$1,000 profit thereon. The plaintiff alleges, that after the contract was secured, and the bond signed, Pfeiffer and the other two defendants wholly refused to permit him to participate in the prosecution of the work, and excluded him from the partnership which had been agreed upon; that the defendants were proceeding with the work, had already made \$1,000 in profits, and that when completed the contract would yield a net profit of \$3,000. He demanded judgment for \$1,000.

On motion of the defendants below, the court struck out that part of the complaint which avers that but for the alleged agreement of partnership between the parties to the suit, the plaintiff would have bid for and received the contract for the construction of the work proposed, and would have made a profit of \$1,000 thereon.

The appellant complains of this, and insists that the ruling on the demurrer to his complaint should be considered here as though the rejected averment remained in. Apart from the averment eliminated, there can be little question of the invalidity of the complaint. With that part considered as in, it is bad beyond any doubt whatever. Without the averment in question, it is fairly inferable from the complaint that the agreement to form a partnership was nothing more

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nor less than a thinly disguised scheme to stifle or diminish competition for the obtainment of a contract to construct a public work. With the averment in, the real purpose of the partnership is not left to inference, the averment being baldly, that but for the agreement the plaintiff would have bid for and received the contract for the work, at a price at which he would have derived a profit of \$1,000. In effect, this is to say, that the appellant and appellees were about to bid for the construction of a public work, which was to be let in pursuance of law, and that the appellant was induced to withhold a lower bid than that which appellee Pfeiffer proposed to make, in consideration that he should be taken into partnership, and be permitted to share in the profits of a contract which the appellee Pfeiffer was thus to secure. Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of profits anticipated or accrued.

The statute under which free turnpikes or gravel roads are constructed, requires contracts for their construction to be let to the lowest and best bidder, and that all bids shall be sealed when filed. If the courts should lend any countenance to such a contract of partnership, as that disclosed in the complaint, in either aspect in which it is presented, the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the Legislature in requiring such contracts to be let to the lowest and best bidder.

The whole purpose of the statute is to encourage open, fair competition between responsible bidders, and any secret combination, call it partnership or anything else, the effect of which is to abate honest rivalry or prevent fair competition, is to be condemned as violative of public policy, and void. No one can predicate an enforceable right upon such an agreement. *Atcheson v. Mallon*, 43 N. Y. 147 (3 Am. R. 678); *Woodworth v. Bennett*, 43 N. Y. 273 (3 Am. R. 706);

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Gibbs v. Smith, 115 Mass. 592; *Hannah v. Fife*, 27 Mich. 172; *Greenhood Pub. Pol.* 178, 179, and notes.

The partnership contemplated by this agreement was a secret arrangement, unknown to the officers who had the public interest under their protection. It was intended that the officers should believe they were contracting with Pfeiffer alone, while he and those who were accepted as sureties on his bond intended among themselves a secret partnership wholly unknown to the board of commissioners. No lawful contract of partnership resulted from such a combination. *Armstrong v. Armstrong*, 3 Mylne & Keen, 45.

Persons who engage in forming partnerships of the character disclosed, must rely for a division of the resulting profits upon those sentiments of honor which are supposed to prevail among all who form combinations which are condemned by the policy of the law.

The purpose, tendency, and necessary effect of such a contract was to stifle fair, open, actual competition, and to perpetrate a fraud upon the public officers. If, in letting a contract such as this, parties, without knowledge of the bids of each other, submit their bids as the law requires, and afterwards enter into a partnership for the construction of the work with the knowledge of the officers letting the same, a question of a different character is presented. Such a transaction bears some similitude to the contract which was upheld in *Breslin v. Brown*, 24 Ohio St. 565 (15 Am. R. 627), a case which, on account of the liberal view taken of the contract there involved, is not universally endorsed. That case, however, affords no aid to the appellant here.

The judgment is affirmed, with costs.

Filed Nov. 3, 1886.

Andis v. Personett.

No. 12,447.

ANDIS v. PERSONETT.

LEASE.—Execution of Note for Rent.—Condition Precedent to Right of Possession.—“*Good and Approved Freehold Surety,*” *Meaning of.*—A farm lease, executed in August, stipulated that the lessee was to have immediate possession for the purpose of sowing wheat, and full possession of the whole farm on December 25th, the lessor in the meantime to make certain repairs. The lessee was to execute his note, due at the end of the term, for the amount of the rent, bearing interest from December 25th, “with good and approved freehold surety.” Action begun October 1st by the lessee to recover damages for a breach of the lease.

Held, that the execution of the note was not a condition precedent to a partial possession for wheat sowing, but only a condition precedent to full possession, and, it having been executed prior to the filing of the complaint, no rights of the lessee were forfeited.

Held, also, that the provision for “good and approved freehold surety” did not give the lessor the right to arbitrarily reject any note tendered, but it should be construed to mean “good freehold surety worthy of approval.”

INSTRUCTION TO JURY.—Harmless Error.—A judgment will not be reversed on account of an erroneous instruction which is harmless.

BILL OF EXCEPTIONS.—Time of Filing.—Where a bill of exceptions is neither presented to the judge nor filed within the time given, it is not, under sections 629 and 1849, R. S. 1881, a part of the record.

From the Hancock Circuit Court.

J. I. Mason, J. H. Mellett and R. Williamson, for appellant.

J. A. New and J. W. Jones, for appellee.

NIBLACK, J.—On the 18th day of August, 1884, Morgan Andis and Amos M. Personett entered into the following agreement in writing:

“This lease, made and entered into by and between Morgan Andis, of the first part, and Amos M. Personett, of the second part, witnesseth that the said Morgan Andis has this day leased and rented, and to farm let unto said Personett, the farm on which the said Andis now resides, in Brandywine township, Hancock county, Indiana, containing about one hundred and fifty (150) acres. Said Personett is to have

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the possession of said farm at once for the purpose of sowing wheat on the same this fall, and is to have full possession of all of said farm from the 25th day of December, 1884, until the 25th day of December, 1885. The clover that is now on said farm is not to be plowed up by said Personett, but is to be fenced off by said Andis, in good order, so as the said Personett can pasture the same next summer, and said Andis is to raise and repair the culvert across the pike near the grave-yard, so that stock can pass under the same, back and forth to water. Said Andis is to deliver the possession of said farm to said Personett on the 25th day of December, 1884, with a dwelling-house, and the fencing on said farm in good repair, and the same is to be kept in good repair, and delivered up to said Andis in good repair at the expiration of the said lease by the said Personett, natural wear and tear excepted. Said Andis to repair the barn, to fix the floor and wheat-bin and corn-crib in the same, and fix a way to feed stock from the upper floor of said barn to the lower floor of the same. Said Personett is to have the stalk-field pasture on said farm in the fall of 1884, and said Andis to have the said stalk-field pasture on said farm in the fall of 1885. The said Personett is to have the right to pasture the stubble-field on said farm in the fall of 1885, in a reasonable manner, until the first day of September, 1885, that may be in clover, and the remainder, if any, as long as he sees fit, and said Personett is to have the right to use firewood, for his own use, as long as he occupies said farm, as the tenant of said Andis, out of the waste or dead timber not fit for saw or rail timber. Said Personett is not to have the right to pasture the door-yard or orchard on said farm. The said Personett agrees to pay said Andis, as rent for said farm, the sum of five hundred dollars, and to execute his note for said amount, due on the 25th day of December, 1885, bearing interest at eight per cent. from the 25th day of December, 1884, with good and approved freehold surety. Should said Personett fail or refuse to perform the said con-

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tract in regard to the execution of said note, he shall forfeit all of his right to the possession of said farm."

On the 1st day of October, 1884, Personett filed his complaint in the court below, founded upon the foregoing lease, in which he averred that he had executed a note to Andis for the sum of \$500, with interest at the rate of eight per cent., conformably in all respects to his agreement to execute a note in that sum, bearing date the 6th day of September, 1884, and procured one Daniel Snider to sign the same as surety thereon; that said Snider was at the time, and has since continued to be, the owner of real estate, in Hancock and Madison counties, in this State, of the value of \$20,000, and free from every encumbrance whatever; that the said Snider was worth, over and above all his indebtedness, the sum of \$20,000; that after said note was so executed he, Personett, tendered the same to Andis, who refused to either receive or accept such note, "without cause;" that he, the said Personett, at the time of tendering said note, and at divers times thereafter, demanded from the said Andis, possession of so much of the farm as was necessary to enable him to sow wheat, as was provided by the lease he might do in the autumn of 1884, but that the said Andis had refused at all times to permit him, the said Personett, to take possession of, or to have access to any part of the farm, and had absolutely refused to allow him to sow wheat thereon. Upon these and other facts charged, both general and special damages were demanded.

At the succeeding October term of the court below, a demurrer to the complaint was overruled, and a trial resulted in a verdict and judgment for Personett, the plaintiff.

Error is assigned upon the overruling of the demurrer to the complaint, and upon the denial of a motion for a new trial, which was, at the proper time, interposed.

As against the sufficiency of the complaint, it is urged that as no time was specified within which Personett was to execute a note to Andis for the rent of the farm, it was requisite

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that such a note should be executed within a reasonable time ; that what was a reasonable time, under the circumstances, was a question of law for the court ; that, therefore, the precise time at which the note prepared by Personett was executed and tendered ought to have been alleged in the complaint ; that, conceding that the note was executed and tendered on the day on which it bore date, which did not by any means follow, such execution and tender were not within a reasonable time, since the ordinary time for the preparation for sowing wheat that season had already expired.

As we construe the lease, the execution of a note for the rent was not a condition precedent to Personett's right to a partial possession of the farm for the purpose of sowing wheat. For that purpose he was to have possession "at once," while all the other agreements and stipulations of the lease were of a character which required some intervening time for their performance.

There was a reason for not requiring the execution of the note to be a condition precedent to the right to sow wheat, as Andis did not bind himself to give full possession of the farm until the 25th day of December following, and as the sowing of a part of the farm in wheat, in the meantime, by the labor and means of Personett was not likely to entail any loss upon Andis, Andis evidently had until the 25th day of December, 1884, in which to complete the repairs which he agreed to make, and the inference is plain that all the provisions of the lease were not to go into full effect until that day.

This inference leads us to hold that the execution of a note for the rent by Personett was only a condition precedent to his right to full possession of the farm on said 25th day of December, 1884, and that he was not absolutely required to execute such a note previous to that time. As has been seen, the note was not to begin to bear interest until that day, and hence it was not to become a profitable security until the time fixed for interest to begin. This fact strengthens our con-

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clusion as to the length of time allowed to Personett in which to execute the note.

The further inference from the averments of the complaint is, that the note was executed and tendered previous to the time at which the complaint was filed; and we regard that as having been in ample time to prevent a forfeiture of any of Personett's rights to possession under the lease.

It is further urged that the provision of the lease which obligated Personett to procure a "good and approved freehold surety" to sign the note with him, conferred upon Andis the right, as he might see fit, to approve or disapprove any person who may have been offered as surety under that provision, and that hence Andis had the right to reject any note tendered by Personett on which the surety was, for any cause, unacceptable to him. We are unable to agree to such a construction of the lease. The word "approve" has several shades of meaning. One of the definitions which Webster gives of it is, "to make or show to be worthy of approbation or acceptance, to commend," and it is in that sense we construe the word as it was used in connection with the surety which was to be furnished by Personett. The phraseology used in the provision in question was equivalent to saying that Personett should execute a note, with "good freehold surety worthy of approval." In view of the nature of the transaction as evinced by the entire lease, any less liberal construction than this would scarcely seem reasonable, and might have been made to work great injustice to Personett. We consequently see no objection to the substantial sufficiency of the complaint.

At the trial the circuit court instructed the jury that whether the note was tendered within a reasonable time, was a question of fact for their determination under all the circumstances of the case in evidence before them, and it is still further urged that the circuit court erred in so instructing the jury, upon the ground that such reasonableness of time was a question of law for the court, and hence not one of fact for

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the jury. But whether this objection to the instruction is or is not well taken, as an abstract proposition, we need not inquire, since the jury must have come to the conclusion that the note was tendered within a reasonable time, and as, for the reasons already given, we consider the conclusion thus reached as a correct conclusion, Andis has, in any event, no reason to complain of any material injury as resulting from the instruction. In such a case a judgment ought not to be reversed on account of an instruction which may have been abstractly erroneous. *Roots v. Tyner*, 10 Ind. 87; *Rollins v. State*, 62 Ind. 46; *Ricketts v. Harvey*, 106 Ind. 564.

Some questions upon the evidence are suggested in argument, but in response to these objections the point is made that the bill of exceptions, purporting to contain the evidence, is not properly in the record, and that the evidence is, in legal contemplation, not before us.

On the 7th day of November, 1884, sixty days time was given within which to prepare and file a bill of exceptions in the cause, and the transcript shows that the bill of exceptions, purporting to contain the evidence, was not presented to the judge for his signature until the 7th day of January, 1885, and that it was not filed until the 14th day of that month. The bill of exceptions was, therefore, neither presented to the judge nor filed in time, and hence is not a part of the record. R. S. 1881, sections 629 and 1849; *Corbin v. Ketcham*, 87 Ind. 138; *LaRose v. Logansport Nat'l Bank*, 132 Ind. 332; *Shulse v. McWilliams*, 104 Ind. 512; *Robinson v. Anderson*, 106 Ind. 152.

The judgment is affirmed, with costs.

Filed Nov. 16, 1886.

Meyer et al. v. Fromm et al.

No. 12,855.

MEYER ET AL. v. FROMM ET AL.

TOWN.—Grade of Street.—Invalid Order Fixing.—Emergency Clause.—Notice of Adoption.—Liability of Contractor for Street Improvement to Lot-Owner for Injury.—Where an order establishing the grade of a street in a town is passed by the board of trustees without an emergency clause, and no notice of its adoption is given, a lot-owner whose property is injured by the improvement of the street, may maintain an action against the contractor for the damage.

From the Dubois Circuit Court.

J. E. McCullough, J. H. Miller and O. A. Trippet, for appellants.

B. Buettner, E. A. Ely and J. W. Wilson, for appellees.

ELLIOTT, J.—On the 2d day of June, 1884, the trustees of the town of Huntingburgh employed a competent engineer to establish the grades of the streets of the town, and during the same month they approved and adopted the grades fixed by the engineer. On the 24th day of that month a petition was filed praying for the improvement of Fifth street, and that "it be brought to the grade established by the board of trustees at its session of June 18th, 1884." Notice was given, contracts awarded, and the work of improving the street was done under the contract. "The order establishing the grade contained no emergency clause declaring the same in force from and after its passage, and no notice was given of its adoption by publication or otherwise." The appellees are the owners of land abutting on Fifth street, and were injured by the excavation of the street made in the course of the improvement, to the amount of \$200.

The facts, of which we have given a synopsis, are set forth in detail in the special finding, and upon them the court stated this conclusion of law: "The order adopting the grade of Fifth street, not containing an emergency clause and no notice thereof having been given, is not sufficient to establish

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said grade according to law. And that hence the grading and excavation were illegal, and the plaintiff Anna is entitled to recover from the said defendants the sum of two hundred dollars."

We think the court's conclusion was right. The statute contains this provision: "But every by-law, ordinance, or regulation, unless in a case of emergency, shall be published in a newspaper in such town, if one be printed therein, or posted in five public places, at least ten days before the same shall take effect." R. S. 1881, section 3333, sub-section 16.

The order fixing the grade of the corporate streets is certainly embraced within the language of the statute, for it is not a mere order made in transacting ordinary business, but is an important regulation, general in its character, and affecting many citizens. *Mattingly v. City of Plymouth*, 100 Ind. 545. And as that language is imperative the order never became effective. As there was no order fixing the grade of the street, the acts of the contractors were without authority of law, and they are liable for all injuries done the appellee's property. The case of *City of Aurora v. Fox*, 78 Ind. 1, is not in point, for the question there was very different from that here presented. The question there decided was not as to the liability of contractors where there was no established grade, but as to their liability where there was some omission or defect in advertising for proposals and in awarding the contract.

Nor do the cases of *Mattingly v. City of Plymouth*, *supra*, and *City of Terre Haute v. Turner*, 36 Ind. 522, apply, for the question here is, not whether a municipal corporation may establish the grade of a street by an order or resolution, but the question is, can it be done by any measure not brought into effect by publication? An order establishing the grade of a street, if not a by-law, is, at least, a "regulation," and to regulations the language of the statute expressly applies.

The only question which the record presents is as to the correctness of the conclusion of law, and as that is adjudged to be right, the judgment must stand.

Judgment affirmed.

Filed Nov. 16, 1886.

No. 12,395.

WAGONER v. WILSON ET AL.

CONTRACT.—*Loan of Money Without Stipulation for Credit.*—*When Becomes Due.*—Where money is loaned without any stipulation for credit, it becomes due presently.

PLEADING.—*Averment that Demand is Due.*—*Implication of Law.*—Where, from the facts pleaded, the law implies that money sued for is due, a specific averment that it is due is not necessary.

SAME.—An averment in a complaint to recover money loaned, that the defendant has "refused to pay the plaintiff though often requested so to do," is sufficient to show by inference that the indebtedness is due and unpaid.

SAME.—*Money Had and Received.*—*Bill of Particulars.*—In an action for the recovery of money, where the complaint alleges that money was advanced to, and had and received by, the defendant from the plaintiff at or about a given time, no further bill of particulars is necessary, unless required by a motion to make the complaint more certain.

SAME.—*Account.*—Where an indebtedness sued for is not evidenced by a written instrument, and is so described in the complaint as to indicate with certainty the items and dates of the account, an additional bill of particulars is not necessary.

BILL OF EXCEPTIONS.—*Long-Hand Manuscript of Official Reporter.*—In order that the original long-hand manuscript of the report of the evidence in a cause, made by an official reporter, may be certified to the Supreme Court, it must first be incorporated bodily in a bill of exceptions. Section 1410, R. S. 1881.

SAME.—*Written Instruments and Documentary Evidence.*—*Use of Words "Here Insert."*—It seems that the long-hand manuscript of the official reporter is not within the phrase "written instrument or documentary evidence" as used in section 626, R. S. 1881, which authorizes such instruments.

108	210
135	48
135	155
137	568
108	210
128	368
129	470
108	210
130	351
130	390
108	210
131	421
133	383
108	210
135	194
135	620
136	473
108	210
137	151
138	496
138	505
139	569
108	210
140	290
141	976
141	504
141	510
108	210
146	233
108	210
153	483
108	210
154	195
108	210
180	497
108	210
165	668

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and evidence to be brought into a bill of exceptions by the use of the words "here insert."

SAME.—*Preparation of Bill.*—For suggestions as to the preparation of a bill of exceptions containing the long-hand manuscript of the official reporter, see opinion.

From the Shelby Circuit Court.

E. K. Adams and *L. J. Hackney*, for appellant.

E. P. Ferris, *W. W. Spencer* and *J. S. Ferris*, for appellees.

MITCHELL, J.—This was a suit by Wilson against Wagoner and Buell. The complaint is in three paragraphs.

The first paragraph is a common count to recover fifteen hundred dollars "for money had and received of the plaintiff, on the — day of December, 1879."

The second paragraph is the same in substance as the first, except that it avers that the money sought to be recovered was loaned and advanced to the defendants as partners, by the plaintiff, in the months of December, 1879, and January, 1880.

The third paragraph avers that the defendants were indebted to the plaintiff in the sum of three hundred dollars for hogs sold and delivered by the plaintiff to the defendants in the months of November and December, 1879, and January, 1880, and that the hogs were purchased by plaintiff of one Alexander Laddy at a price mentioned.

A separate demurrer to each paragraph of the complaint was overruled. The first assignment here is that the court erred in overruling the demurrer to the complaint.

In support of this assignment it is argued that each paragraph of the complaint is an action upon an account, and that with each there should have been set out a bill of particulars containing the items and dates of the account sued on. It is said further that the second paragraph is defective in not averring that the indebtedness sued for was due and unpaid. In respect to this last objection it may be said, the paragraph seeks a recovery of money advanced to and for the use of

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the defendants in their business. Money so advanced, unless credit is stipulated for, becomes due presently. From the facts stated in the complaint, the law implied that the money sued for was due.

The paragraph contains the averment, following the statement that plaintiff advanced and loaned fifteen hundred dollars to and for the use of defendants, that the defendants "have refused to pay the plaintiff though often requested so to do." This, though not a direct and explicit allegation that the money advanced remained unpaid, made it reasonably certain by inference that the sum advanced was due and unpaid at the time the complaint was filed. *Higert v. Trustees, etc.*, 53 Ind. 326; *Catterlin v. Armstrong*, 101 Ind. 258; *Hartlep v. Cole*, 94 Ind. 513.

In respect to the objection that no bill of particulars accompanies the complaint, it is sufficient to say that the first and second paragraphs are for the recovery of a specific sum of money advanced and loaned to, and had and received by, the defendants from the plaintiff, within a time designated in the complaint.

In an action for the recovery of money, where the complaint alleges that money was advanced to, and was had and received by, the defendants from the plaintiff, at or about a given time, no further bill of particulars is necessary, unless required by a motion to make the complaint more certain. In such a case the action is not, strictly speaking, on an account. *Sharp v. Radebaugh*, 70 Ind. 547; *State, ex rel., v. Sims*, 76 Ind. 328; *McFadden v. Wilson*, 96 Ind. 253.

The third paragraph counts upon an indebtedness of three hundred dollars for hogs sold by the plaintiff to the defendants during certain stated months. The transaction is further identified by an unnecessary statement in the body of the complaint, to the effect that the hogs sold were thirty head purchased by plaintiff from Alexander Laddy, giving their weight and the price per hundred. Where an indebtedness sued for is not evidenced by a written instrument, and is so

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particularized or described in the body of the complaint as to indicate with certainty the items and dates of the account upon which a recovery is sought, an additional bill of particulars would serve no useful purpose. There was no error in overruling the demurrer to the complaint.

After the demurrer to the complaint was overruled, issues were formed by an answer in denial. Pleas of payment and of settlement and satisfaction of each and every item of the indebtedness sued for, before the bringing of the suit, were also filed. A trial was had by a jury, with the result that upon the verdict returned, a judgment was rendered against Wagoner for \$260, and in favor of his co-defendant Buell. Wagoner appealed, and in addition to the assignment already disposed of, he complains by proper assignment, that the court erred in overruling his motion for a new trial.

Under this assignment, the rulings of the court in excluding certain evidence offered by the appellant, and in giving, at the appellant's request, certain instructions, are questioned.

Whether or not any question is presented for consideration by this assignment,—no attempt having been made to reserve such questions otherwise,—depends upon whether the bill of exceptions purporting to contain the evidence is in the record.

It does not appear from any certificate of the clerk, or from any recital in the record, that the long-hand manuscript of the short-hand report of the evidence was ever filed with the clerk, or in the court below, nor is the manuscript, as such, in any manner covered by the certificate of the clerk to the transcript before us. Looking at the transcript and the certificate of the clerk attached, it would be inferred that the evidence, both oral and written, was all embodied in one bill of exceptions, duly signed by the judge, and afterwards filed within the time allowed and literally copied into the record by the clerk. If nothing further appeared, there would arise no doubt but that the evidence was properly in

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the record, within the ruling in *Longworth v. Higham*, 89 Ind. 352; *Williams v. Pendleton, etc.*, T. P. Co., 76 Ind. 87.

The appellees have, however, upon proper application therefor, obtained a writ of *certiorari*, requiring the clerk of the Shelby Circuit Court to certify to this court a true copy of any and all bills of exception filed by the appellant in the court below.

In answer to this writ, the clerk has certified a "true and complete copy of the only bill of exceptions filed by Robert Wagoner in said cause."

The bill of exceptions thus certified must control. Premising that the record shows that a short-hand reporter for the Shelby Circuit Court had been duly appointed, and that the bill of exceptions, last certified, embraces the instructions of the court, the motion for a new trial, and the ruling thereon, and recites that sixty days' time had been given within which to file bills of exception, all that is contained in the bill, relating to the evidence given in the cause, is the following:

"Comes now the defendant, Robert Wagoner, and tenders to the court this, his bill of exceptions in the above entitled cause, as follows, to wit (clerk here insert the short-hand report of the evidence) * * * and the said Wagoner now within the time aforesaid tenders this, his bill of exceptions in this cause, and prays that the same may be signed, sealed and made a part of the records herein, which is accordingly done. Witness my hand and official seal this 6th day of June, 1884.

(Signed) "K. M. HORD, Judge."

Section 1410, R. S. 1881, provides, in substance, that the long-hand manuscript of the verbatim report of the evidence in a cause, made by an official reporter, may be filed with the clerk by the party requiring the same. Upon appeal, the clerk, if requested to do so by such party, must certify the manuscript so filed, "when the same shall have been incor-

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porated in a bill of exceptions, to the Supreme Court or other court of appeal, instead of a transcript thereof."

Under this section a party, desiring to avail himself of the long-hand manuscript of the oral evidence taken in a cause, must incorporate such manuscript bodily into a bill of exceptions, and tender the bill to the judge within the time allowed for that purpose, when it becomes the duty of the judge, after examination, to sign, and cause it to be filed, as provided in section 629, R. S. 1881. *Woolen v. Wishmier*, 70 Ind. 108; *Lowery v. Carver*, 104 Ind. 447; *Marshall v. State, ex rel.*, 107 Ind. 173.

When it is thus incorporated into a bill of exceptions, signed and filed, it becomes the duty of the clerk, on request of the party entitled, to certify it to the appellate court, with the transcript of the record, without inserting anything, or otherwise changing it in respect to the matter contained in the bill.

All that is necessary in order to prepare a bill of exceptions which shall incorporate the original long-hand manuscript, is to prepare the usual formula for the beginning of an ordinary bill of exceptions, with a recital that the following oral evidence was delivered, and the rulings of the court in respect to the admission and rejection of evidence, and the objections and exceptions thereto, were made and taken, as noted, and that a verbatim report of such evidence, and the rulings, objections and exceptions thereon and thereto, was made by an official reporter, naming him, of which evidence, rulings, objections and exceptions so made and taken, the following is the original long-hand manuscript as the same was made and filed.

Something similar to the foregoing, attached as a preface to the long-hand manuscript, with the usual formal ending of an ordinary bill of exceptions, not omitting at the appropriate place the usual statement that "this was all the evidence given in said cause," incorporates the manuscript into a bill ready for presentation to the judge for examination and

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signature. When so incorporated, signed and filed, the clerk may be required to certify the original long-hand manuscript of the official reporter to this court without copying it into the transcript. Section 626, R. S. 1881, is applicable to bills of exceptions which embrace written instruments, or documentary or other evidence, or matter which is to be copied into the transcript by the clerk in making up a record for this court.

This section provides that in making up a bill of exceptions, it shall not be necessary to copy a "written instrument or any documentary evidence" into the bill, but it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words "here insert."

A somewhat liberal construction has apparently been given to the phrase "written instrument or any documentary evidence," as used in this section, but we should hesitate to affirm that these words would embrace the official reporter's original long-hand manuscript of the oral evidence taken in a cause. However this may be, the provision referred to in section 626, which authorizes written instruments or documentary evidence to be thus incorporated in a bill, relates to such instruments and evidence as are thereafter to be transcribed by the clerk in making the transcript, and not to the reporter's long-hand manuscript when that is to be certified up under section 1410.

The paper or documentary evidence which may be inserted by the clerk, at the place designated, when the bill is copied into the transcript by him, must be so identified and described in the bill, as that the clerk may know to a certainty the particular instrument or document which he is to transcribe and insert at the point indicated. *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31 (36), and cases cited. This, of course, has no application to a case where the original manuscript itself is to be incorporated into a bill and certified to this court. In such a case there is nothing for the clerk to transcribe or insert.

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Even if it were admissible to bring the original long-hand manuscript of the evidence into a bill of exceptions in any case, for any purpose, by a "here insert," without attaching the manuscript to, or otherwise incorporating it bodily into the bill, it is not properly brought into the bill in this case. There is nothing in the bill of exceptions, or anywhere in the record, to show that the reporter had made or filed a long-hand manuscript when the bill was filed, nor does it contain anything to identify or designate "the short-hand report of the evidence" which the clerk is directed to insert.

Any view we may take of the question leads to the conclusion that the evidence in this case is not in the record. This conclusion reached, the result necessarily follows that it does not affirmatively appear, in the case under consideration, that there was any substantial error which did the appellant material harm.

Every reasonable presumption in favor of the propriety of the rulings and instructions made and given by the court below will be indulged, until the appellant, upon whom rests the burthen, makes it appear that such rulings and instructions were erroneous and harmful to him.

The judgment is affirmed, with costs.

Filed Nov. 5, 1886.

No. 12,807.

BLACKER v. DUNBAR.

PROMISSORY NOTE.—*Action on.*—*Party in Interest.*—*Estoppel.*—The maker of a promissory note is estopped from denying that the payee is the real party in interest.

SAME.—*Meritorious Defence.*—*Answer of.*—*Demurrer.*—An answer to a complaint on a non-negotiable note, that the plaintiff is not the real party in interest, and that if the action were brought by the proper person, the defendant had a good defence thereto, but not stating what the de-

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162	389

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fence is, nor why he can not avail himself of it in the action as brought, is bad on demurrer.

SAME.—Payment to Protect Title.—Set-Off.—An answer alleging that the note in suit was given for real estate inherited by the payee's wife, and that the defendant, in order to protect his title, had been compelled to pay said wife's portion of the debts of the ancestor which his personalty had failed to pay, in a sum equal to the amount due on the note, but failing to allege that the land had been conveyed to him by deed with covenants of warranty, or that the payment had been made at the request of the plaintiff or his wife, or that either of them had promised to repay the amount, or to give him credit on the note therefor, is bad both as a plea in bar and as an answer by way of set-off.

SAME.—Contract.—Consideration.—Admissions in Pleadings.—Where the plaintiff in his reply admits the contract counted on in the answer, he thereby admits the stated consideration therefor, and, if it is sufficient, he can not claim that the contract is without consideration, or that it should be supported by any other or different one.

PLEADING.—Appeal from Justice.—Unnecessary Reply.—Ruling on Demurrer to.—Reversible Error.—Where, upon an appeal to the circuit court, the plaintiff elects to file a reply, and an erroneous ruling is made thereon injurious to the defendant, the judgment will be reversed although, under sections 1643 and 1502, R. S. 1881, the reply was not necessary.

From the Clinton Circuit Court.

F. M. Goldsberry, T. H. Palmer and W. F. Palmer, for appellant.

E. Sparks, J. V. Kent and J. W. Merritt, for appellee.

Howk, C. J.—This suit was commenced by appellee, before a justice of the peace of Clinton county, to recover a balance claimed to be due on a promissory note executed to him by the appellant. The trial of the cause before the justice resulted in a verdict and judgment for the appellee. On appeal to the circuit court of the county, additional paragraphs of answer were filed by appellant, and the cause was put at issue. The issues joined were tried by a jury, and a verdict was again returned for appellee, and judgment was rendered accordingly.

Errors are assigned here by appellant, which call in question the rulings of the trial court, in sustaining appellee's demurrers to the first and second paragraphs of appellant's

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answer, and in overruling his demurrer to the second paragraph of appellee's reply to the first paragraph of his answer filed in the circuit court. We will consider and decide the questions presented by each of these alleged errors, in their enumerated order.

1. The first paragraph of appellant's answer was filed before the justice of the peace, and was called a plea in abatement. In this paragraph of his answer, appellant alleged that the note in suit did not belong to appellee, and, as appellant verily believed, was being prosecuted by appellee for the use and benefit of his wife, Rebecca Dunbar; that said Rebecca Dunbar was a resident of the State of Iowa, and a non-resident of this State; that appellee paid no consideration whatever to appellant for such note; that the note was executed by appellant to appellee at the date mentioned in his complaint; that there was no consideration whatever moved from appellee therefor; that the consideration of such note was certain real estate, then and there belonging to said Rebecca Dunbar; that Rebecca Dunbar held such real estate in her own separate right, and sold and conveyed the same to appellant, which was the only consideration for the note in suit; that Rebecca Dunbar, as appellant was informed and verily believed, was the real owner of such note, and the real party in interest, for whom this action was being prosecuted; that appellee had no money interest in, or right or title to, such note, and was not the real party in interest, and that appellant had a good, substantial, lawful and equitable defence to the note in suit, if such note was being prosecuted for the use and in the name of Rebecca Dunbar, who, appellant believed, was the real party in interest and the party to whom such note rightfully belonged; that appellant verily believed that this suit was being prosecuted in the name of Simon Dunbar for the sole purpose, and no other, to deprive appellant of his said defence to this action and the note sued upon; that appellant could not avail himself of his said defence to the note in suit, if the action were prosecuted in the name of

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appellee; that appellee took such note in his own name without any right, and had no legal or equitable title to or interest in the same. Wherefore appellant prayed that on account of the foregoing facts, matters and things, this action should be abated, and that he have judgment for his costs and all other proper relief.

It is claimed by appellant's counsel, that the trial court erred in sustaining appellee's demurrer to the foregoing paragraph of answer. Counsel concede, as we understand them, that the facts stated are not sufficient to constitute a good plea in abatement, but they insist that these facts constituted a good answer in bar of appellee's cause of action. It is true, as counsel claim, that the name given a paragraph of answer or its prayer for relief does not determine its character or sufficiency. But we think there was no available error in sustaining appellee's demurrer to the first paragraph of answer, whether it be regarded as a plea in abatement or an answer in bar. Appellee is the payee of the note in suit, and, in such case, it has been held by this court that the maker of such note is estopped from denying that the payee thereof is the real party in interest. *French v. Blanchard*, 16 Ind. 143; *Rogers v. Place*, 29 Ind. 577; *Wells v. Sutton*, 85 Ind. 70.

But whether appellant was thus estopped or not, it is very clear, we think, that the first paragraph of his answer did not show by its averments of fact, that he had any valid or sufficient defence to the note in suit. In the most positive terms, appellant stated that he had "a good, substantial, lawful and equitable defence" to the note sued upon; but he has failed to state, in this paragraph of answer, what such defence was, or why, if he had such defence, he could not avail himself of it in this action. The note in suit was not payable at a bank in this State and was not governed by the law merchant, and if, as we may suppose, the defence upon which appellant relied was a partial failure of the consideration of such note, we know of no reason why, upon a proper showing of facts, he might not have availed himself of such

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defence as against the appellee, who was cognizant of all the facts. In any event, it is clear to our minds that no available error was committed by the court below, in sustaining appellee's demurrer to the first paragraph of appellant's answer.

In the second paragraph of his answer, filed in the circuit court, appellant admitted his execution of the note sued upon and his payments credited thereon, but he alleged that such note was executed for the undivided one-eighth interest of Rebecca Dunbar in certain described real estate, in Clinton county, Indiana, owned by William Blacker, deceased; that said Rebecca was the daughter of said William and, as such, inherited such interest in said real estate; that, at the date of the note in suit, appellee was, and since had been, the husband of said Rebecca, and, as her husband and agent, sold to appellant her said interest in such real estate, and in consideration therefor took the note in suit in his own name; that such real estate was liable for the excess of the indebtedness of such decedent's estate over and above what the personalty of such estate would pay; that the heirs of such estate were liable for such indebtedness to the extent of their inheritance therefrom; that the indebtedness of such estate, not paid by its personalty, amounted to the sum of \$1,316.67; that the one-eighth part of such sum, for which said Rebecca's interest in such real estate was liable, was \$164.68; that said Rebecca was then and since a non-resident of this State and had no property except her interest in such real estate, which was sold to appellant; and that, after appellant purchased her said interest in such real estate, he was compelled to pay such sum of \$164.68 for said Rebecca, to protect his said title so procured from her. Wherefore appellant said that he had paid all of the note in suit that was justly due; that such sum by him so paid on the indebtedness of such decedent's estate, ought to be set off against any sum that might appear to be due on such note; and he demanded judgment for his costs and all proper relief.

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We are of opinion that the trial court did not err in sustaining appellee's demurrer to the foregoing paragraph of answer. Appellant has stated no facts therein which show or tend to show that the appellee or his wife, Rebecca, became and was indebted to him in such sum of \$164.68, or in any other amount, for or on account of the money he was compelled to pay, as he alleged, on the indebtedness of the estate of William Blacker, deceased, in order to protect his title to the interest in such decedent's lands, procured by him from said Rebecca. It was not alleged in such paragraph of answer, that the appellee and his wife had warranted the title to her interest in such lands, or, indeed, that they had ever conveyed such interest to the appellant by deed, with or without covenants of warranty. Nor was it alleged in such paragraph that the appellee and his wife, Rebecca, or either of them, had ever requested the appellant to pay her share or proportionate part of the indebtedness of such decedent's estate, in excess of what the personalty thereof would pay; nor that they, or either of them, had ever agreed or promised to repay him the amount he paid, as alleged, as her part of such indebtedness, or to give him credit for such amount on the note in suit. This paragraph of answer was hopelessly bad, we think, whether it be regarded as a plea in bar, or as an answer by way of set-off.

In the first paragraph of his answer, filed in the circuit court, appellant admitted his execution of the note in suit, and the payments credited thereon as stated in appellee's complaint; but he averred that before the execution of such note, Rebecca Dunbar, then and since the wife of appellee, was the owner of an undivided one-eighth interest in certain real estate, in Clinton county, Indiana, having inherited such interest from her father, William Blacker, deceased; that, at the date of the note in suit, all the heirs of such decedent believed that his personal property would pay the debts of his estate and leave his lands unencumbered thereby; that appellee as the agent of his wife, Rebecca Dunbar, pro-

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posed to sell her interest in such real estate to the appellant for the sum of \$750; that appellant then and there purchased her said interest in such real estate, for the sum aforesaid, upon the agreement that appellee would stand good to appellant for the one-eighth of the indebtedness of such decedent's estate, which would have to be paid to save such real estate from sale for such indebtedness; that the note in suit was executed in consideration of such sale, and for no other or different consideration; that appellee and his wife, Rebecca, conveyed her said interest in such lands to appellant, who afterwards, on January 25th, 1884, had to pay judgments in the Clinton Circuit Court, which were debts against such decedent's estate, to protect the title to such real estate, describing and giving the amount of each of such judgments, all of which amounted in the aggregate to the sum of \$1,316.67; that the one-eighth part of such sum was \$164.58; and so the appellant averred that the consideration of the note in suit had failed to the extent of such sum of \$164.58, and that he had fully paid all the balance of such note, before the commencement of this suit.

In the second paragraph of his reply to the foregoing paragraph of answer, the appellee said that he admitted the contract therein alleged, but he averred that such contract was made without any consideration whatever.

It was error, we think, to overrule appellant's demurrer to the foregoing reply. When the appellee admitted his contract with appellant, as the latter stated such contract in the first paragraph of his answer filed in the circuit court, he admitted also of necessity that it was made or executed upon a valuable and sufficient consideration. It is shown by the averments of this paragraph of answer, that the appellee as well as the appellant was fully informed of the fact that the personal property of William Blacker, deceased, would be insufficient to pay the indebtedness of such decedent's estate; and that, unless the heirs of the decedent contributed their proportionate parts respectively of the excess of such indebt-

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edness over the amount realized from such personal property, the decedent's real estate would necessarily be sold to make assets for the payment of such excess of indebtedness. With this knowledge on his part, the appellee proposed to and did sell the interest of his wife, Rebecca, in the decedent's real estate to the appellant, and as an inducement to such sale, and as a part of the transaction, he agreed that he would stand good to the appellant for the amount to be contributed by his wife Rebecca, as one of the heirs of the decedent's estate, for the payment of the indebtedness of such estate in excess of the sum realized from the personalty thereof. Upon the faith of this agreement of the appellee, he sold the interest of his wife, Rebecca, in the decedent's estate to the appellant, and, for the purchase-money, took the note in suit payable to himself. In his reply, the appellee admits his contract or agreement, as the appellant has alleged it, and thereby admits of course the consideration therefor, which was of the essence of such contract or agreement, precisely as appellant has stated such consideration in his first paragraph of answer. This consideration was amply sufficient to support appellee's contract or agreement, and having admitted it, as he did in his reply, he can not be heard to claim that his contract or agreement must be supported by some other or different consideration, or that it was without any consideration.

It is true that our statute, regulating proceedings in civil cases before justices of the peace, provides that "No replication shall in any case be necessary; but any matter which might have been replied to any plea may be proved with the same effect as if so replied." Section 1463, R. S. 1881. It is true, also, that on an appeal to the circuit court, in such a case, the cause must "be there tried under the same rules and regulations prescribed for trials before justices." Section 1502, R. S. 1881; *Hill v. Sleeper*, 58 Ind. 221. But it does not follow from these statutory provisions, that the error of the trial court, in overruling the demurrer to a bad paragraph of reply, which need not have been pleaded, can be

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regarded as a harmless error. Certainly, the appellee is in no condition to claim in this case that the error in question was a harmless error. He filed the bad paragraph of reply and thereon obtained a ruling, whereby the court virtually held that appellee's contract or agreement must be shown by appellant to have been made upon a sufficient consideration, other and wholly different from the consideration thereof, as stated in his first paragraph of answer, which entered into and constituted an essential part of the contract or agreement, admitted by appellee in such paragraph of reply. The consideration of such contract or agreement was expressed therein, as the same was stated in appellant's answer; and when appellee "admitted the contract therein alleged," he admitted also the consideration therein expressed, and this consideration was sufficient.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the second paragraph of reply, and for further proceedings not inconsistent with this opinion.

Filed Nov. 16, 1886.

108 225
166 365

No. 12,693.

CARNAHAN v. HUGHES ET AL.

SALE.—*Personal Property.*—*Refusal of Purchaser to Execute Notes as Agreed.*—*Remedy.*—*Measure of Damages.*—Where goods are sold upon credit, the purchaser agreeing to execute notes payable at a future day for the purchase-price, his refusal to do so entitles the seller to maintain an action for the refusal, and the measure of damages is the full price of the goods.

SAME.—*Agency.*—*Authority to Bind Absent Person.*—*Contract.*—*Ratification.*—In order that one person by his agreement may bind another in the purchase of property in his absence, it must be shown either that the

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former had authority to make the contract, or that it was afterwards ratified by the latter upon a sufficient consideration.

SAME.—Sale to Two Persons.—Agreement that Both Shall Execute Notes.—Acceptance of Notes Signed by One.—When Surrender of Necessary to Action Against Other.—Where, upon a sale of goods to two persons, the seller receives and retains notes executed by one for the purchase-price, he can not maintain an action against the other for damages for refusing to sign the notes according to the contract of sale, without returning or offering to return the notes received, or showing an excuse for not doing so.

From the Daviess Circuit Court.

J. Baker, for appellant.

A. J. Padgett and *J. Downey*, for appellees.

MITCHELL, J.—On the 26th day of June, 1883, the appellees, John and Edward Hughes, contracted by and through Edward Hughes, with the appellant Carnahan, for the purchase of a Champion reaper, at the agreed price of \$110. The reaper was delivered to and received by the purchasers.

It was agreed that the purchasers should pay \$37 on the 1st day of September, 1883, \$36 September 1st, 1884, and \$37 on the 1st day of January, 1885, the deferred payments to be secured by the purchaser's notes, drawing interest at six per cent. from August 1st, 1883, until paid, and stipulating for five per cent. attorney's fees. It was also agreed that the title to the property sold should remain in the seller until full payment was made, and that the purchasers should execute their notes for the respective amounts designated, which notes were to evidence the conditions and limitations, above mentioned. Edward Hughes executed the notes according to the terms of the contract, and agreed that John, who was not then present, would within a reasonable time do likewise. Upon demand, John Hughes refused to sign the notes. On the 14th day of January, 1885, the appellant filed his complaint against John and Edward Hughes, setting out the foregoing facts, with copies of the notes signed by Edward, and alleging that the whole of the purchase-price was due and unpaid, and demanding judgment.

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The court sustained the separate demurrer of John Hughes to the complaint, and the propriety of this ruling is the only question for consideration.

The appellees have filed no brief, and we are not advised as to the theory upon which the court proceeded in holding the complaint insufficient.

It is abundantly settled that where goods are sold upon credit, the purchaser agreeing as part of the contract to execute notes payable at a future day for the purchase-price, the refusal of the purchaser to execute the notes according to the contract, entitles the seller to maintain an action for such refusal, and the measure of damages is the full price of the goods sold. *Hays v. Weatherman*, 14 Ind. 341; *Clodfelter v. Hulett*, 72 Ind. 137 (148); *Barron v. Mullin*, 21 Minn. 374; *Hanna v. Mills*, 21 Wend. 90; 2 Benjamin Sales, section 1127.

The difficulty with the appellant's complaint, which induced the ruling below, doubtless was that it appears from the averments therein that the contract for the purchase of the reaper was made with Edward Hughes, who executed his notes for the purchase-price, and who agreed, in the absence of John Hughes, that the latter would sign the notes within a reasonable time thereafter.

Upon this state of facts, without more, it is not apparent how it can be claimed that John Hughes was bound. Suppose Edward Hughes, in the absence of John, did contract for and receive a reaper for both, and that he agreed that the latter would thereafter sign the notes which had been executed by Edward, it does not appear that John and Edward sustained any such relation to each other as authorized the one to bind the other, by any purchase of property for him, or by an agreement made in his absence, that the latter would sign notes therefor; nor does it appear that John Hughes in any manner ratified the contract, or accepted the benefits thereof, with knowledge of what had been agreed upon.

Where one person assumes to bind another in respect to the

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purchase of property in his absence, some relation of partnership, or other agency, must be shown to exist between the person contracting and the one contracted for, through which the person so assuming to contract derives authority in that behalf, either express or implied. Unless some such authority is shown to have existed, or unless it appears that the person on whose behalf an executory contract was made, afterwards ratifies it, upon a sufficient consideration, as by accepting its benefits with full knowledge of the facts, it creates no obligation against a person who is thus sought to be bound. The complaint fails entirely to make a case against John Hughes.

Moreover, if it had appeared that Edward Hughes was authorized to bind his co-defendant to the extent claimed, since the appellant received and retained the notes executed by one of the purchasers in discharge of the contract, it was not competent for him to maintain an action for damages, for a breach of the contract to execute notes according to the agreement, without returning, or offering to return, the notes which he received, or without averring some sufficient excuse for not doing so. While the notes of Edward Hughes are held, he is not in default for not executing them. In the absence of anything to show that the notes as executed and accepted are not collectible, it is not apparent that the appellant, so long as he chooses to hold them, has suffered any injury by the refusal of John Hughes to sign them.

It will be observed that although the action was not brought until after the credit agreed upon had expired, the suit was not in assumpsit to recover the price of the goods, but, in its nature, it is an action for damages for failing to execute the notes according to the agreement.

While such an action may be maintained even before the term of credit expires, it can not be maintained while the seller of goods holds a note which he accepted in pursuance of the contract for credit. 2 Benjamin Sales, section 1127, and cases cited in note 9.

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Indeed, it may be doubted whether he could maintain an action on the account, while holding the note of one of the debtors, without offering to surrender it, or showing that it was worthless. 1 Lindley Partnership, pp. 450, 451, and notes.

The judgment is affirmed, with costs.

Filed Nov. 6, 1886.

No. 12,838.

WOOD ET AL. v. BISSELL.

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ACTION.—Commencement of.—Notice by Publication.—Statute Construed.—Statute of Limitations.—Under section 314, R. S. 1881, an action is not commenced as to a defendant against whom publication is made, until the time of the first publication.

STATUTE OF LIMITATIONS.—Contract Made in this State.—Non-Residence of Defendant.—Statute Construed.—Under section 297, R. S. 1881, if the contract out of which a cause of action arises is made in this State, but the defendant is all the time a non-resident, the statute of limitations does not run.

From the Marion Superior Court.

B. F. Davis, for appellants.

D. M. Bradbury, for appellee.

ZOLLARS, J.—Appellants brought this action against appellee upon an account, which accrued and became due on the 27th day of October, 1875. The complaint was filed on the 26th day of November, 1880. On that day a summons was issued to the sheriff, which, as stated in the record, was returned in due time, with an endorsement that appellee was not found. Nothing further was done in the case, in the way of getting service upon appellee, until the 28th day of June, 1882. On that day, upon an affidavit of the non-residence of appellee, publication of notice was ordered. On the 21st day

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purchase of property in his absence, some relation of partnership, or other agency, must be shown to exist between the person contracting and the one contracted for, through which the person so assuming to contract derives authority in that behalf, either express or implied. Unless some such authority is shown to have existed, or unless it appears that the person on whose behalf an executory contract was made, afterwards ratifies it, upon a sufficient consideration, as by accepting its benefits with full knowledge of the facts, it creates no obligation against a person who is thus sought to be bound. The complaint fails entirely to make a case against John Hughes.

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Wood *et al.* v. Bissell.

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of September, 1883, appellants made proof of publication, by which it was made to appear that the notice was first published on the 23d day of November, 1882. No question being made here as to the regularity of the notice, we decide nothing upon that question. The one question discussed by counsel is, when was the action commenced?

It is assumed on one side, and not much contested on the other, that if it was commenced after the expiration of six years from the time when the account accrued and became due, it can not be maintained, under our statute of limitations. R. S. 1881, section 292.

Appellee, relying upon that statute, pleaded the above stated facts, adding the averments, that the contract for the work, etc., out of which the account arose, was made in this State with an agent of appellee, and that from that time to this, he has been a non-resident of the State.

The code, section 314, R. S. 1881, is as follows: "A civil action shall be commenced, by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons; but as to those against whom publication is made, from the time of the first publication," etc.

There seems to be but one way to interpret this statute. It is plain and explicit, that as to those against whom publication is made, the action is commenced by the filing of the complaint, and the publication of the notice, and shall be deemed to be commenced from the time of the first publication.

Appellee was brought into court, if at all, by the publication of the notice, and that notice was first published more than seven years subsequent to the time when the account became due. The filing of the complaint, and the issuing of the summons to the sheriff, as heretofore ruled by this court, is the commencement of the action, as to those upon whom the summons is served, but not as to those who never are served, and as against whom publication is made.

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We must hold here, therefore, that the action against appellee was not commenced until the first publication of the notice, which, as we have seen, was more than seven years after the account became due.

The court below held the answer good, and overruled appellants' demurrer thereto.

If the case, as made by the pleadings, is one to which the above statute of limitations is applicable, that ruling was correct. If not, the ruling was wrong, and the judgment must be reversed.

The attention of the court below, doubtless, was not called to another section of the statute of limitations, which we think is clearly applicable and controlling. Counsel have not relied upon that section, and if we should apply the general rule, and notice no point not discussed by counsel, an affirmation of the judgment might result. In this case, however, we could not apply that rule without putting the court into a false position, and, by holding a bad answer good, mislead the profession.

As we have seen, the answer shows that the contract, out of which the account arose, was made in this State, and that from that time to this appellee has been a non-resident of the State.

The statute of limitations, section 297, R. S. 1881, is as follows: "The time during which the defendant is a non-resident of the State * * * shall not be computed in any of the periods of limitation; but when a cause has been fully barred by the laws of the place where the defendant resided, such bar shall be the same defence here as though it had arisen in this State: *Provided*, That the provisions of this section shall be construed to apply only to causes of action arising without this State."

In the recent case of *Mechanics Building Ass'n v. Whitacre*, 92 Ind. 547, the above statute was interpreted, and it was held that, under it, the time during which the debtor,

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upon a contract made in this State, was a non-resident of the State, is not to be computed in the period of limitation.

In this case, as shown by the answer, the statute of limitations has not begun to run, and has not run against the claim in suit, because, as heretofore stated, appellee has all the time been a non-resident of the State.

It results that the court below erred in overruling appellants' demurrer to appellee's answer. For that reason the judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to sustain the demurrer to the answer.

Filed Nov. 16, 1886.

No. 12,975.

STERNE v. VERT ET AL.

APPEAL.—*Acceptance of Benefits Under Judgment Precludes Appeal.*—A party can not accept the benefit of an adjudication and yet allege it to be erroneous.

SAME.—*Mortgage.—Foreclosure.—Procuring Sale Under, Bars Appeal from Decree.*—Where, in a suit to foreclose a mortgage covering different tracts of land, a decree is given that the mortgage is invalid as to one tract but a valid lien upon the others, and the plaintiff procures a sale to be made thereunder of the latter, and buys in those tracts, he can not afterwards appeal from the decree, alleging it to be erroneous.

From the Hamilton Circuit Court.

T. J. Kane and T. P. Davis, for appellant.

F. M. Trissal, for appellees.

MITCHELL, J.—This was a suit by Sophie Sterne to foreclose a mortgage executed by William Vert and Augusta, his wife, on the 20th day of October, 1881.

The mortgage covered three separate parcels of land, in Hamilton county. At the time the mortgage was executed

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143	183
108	232
144	167
108	232
148	538
148	539

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the mortgagors, William and Augusta Vert, owned one of the tracts mortgaged, as tenants by entireties. Prior to the commencement of this suit both William Vert and his wife departed this life, the husband having died first.

The contest below related wholly to the tract of land owned as above, by the husband and wife. The surviving children and heirs of the wife, by a cross complaint, set up the state of the title at the time the mortgage was executed, and alleged that the mortgage was void, because the debt thereby secured was the debt of their father, William Vert, the husband of Augusta, who it is alleged was surety.

Upon issues made on the complaint and cross complaint, the court found the facts specially, and stated conclusions of law, to the effect that there remained due the plaintiff on her mortgage debt the sum of \$2,000, and that the mortgage was a valid lien upon two of the tracts of land therein described, and invalid as to the tract in contest, as above mentioned.

A decree was given for the plaintiff below, foreclosing the mortgage, and ordering the sale of two of the tracts, and in favor of the cross complainants as to the other, quieting their title thereto.

From this decree the appellant, who was the plaintiff below, appealed to this court, the record having been filed here on March 27th, 1886.

Various errors are assigned, upon which a reversal of the decree is asked.

The appellees, on the 2d day of September, 1886, by a verified special answer in bar to the errors assigned, allege that after the judgment and decree were rendered in the court below, to wit, on the 31st day of December, 1885, the appellant caused a copy of the decree and order of sale to be issued out of the office of the clerk of the circuit court of Hamilton county, and placed the same in the hands of the sheriff, who proceeded to advertise and sell two of the tracts of land embraced in the decree. It is averred that at such sale, which is alleged to have occurred on the 23d day of January, 1886,

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A. N. Martin and H. L. Martin, for appellants.

J. S. Dailey, L. Mock and A. Simmons, for appellee.

ELLIOTT, J.—The complaint of the appellee is for the recovery of real estate, and is against two of the appellants, Michael and Ellen Quill.

The complaint is undoubtedly good as against the defendants named in it, and an attack upon it in the assignment of errors by parties subsequently brought into the case can not prevail. If a complaint is good as against the parties against whom it is directed, it can not be successfully challenged for the first time in the assignment of errors made by parties brought into court on the application of one of the original defendants.

If the parties interested in land are all properly in court, no matter whether brought in by the original complaint or by cross complaint, the court may settle and adjudicate all conflicting claims and equities. The object of our code is to enable the court to settle the whole controversy by one decree, and this it may do when all the parties are before it.

If the appellants who were brought in after the complaint was filed, by their co-appellants, were not satisfied with the decree, they ought to have moved to modify it; failing to do this they can not for the first time present the question in this court. *Bayless v. Glenn*, 72 Ind. 5, and cases cited; *American Ins. Co. v. Gibson*, 104 Ind. 336, see p. 342.

If, however, we were in error in this, it would avail these appellants nothing, because the rule is firmly settled that an objection to a judgment, not exhibited by a bill of exceptions, is unavailing. *Adams v. LaRose*, 75 Ind. 471; *Stelzer v. LaRose*, 79 Ind. 435; *Marquess v. La Baw*, 82 Ind. 550; *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *Forsythe v. Kreuter*, 100 Ind. 27.

It is not improper to add that we are satisfied from an examination of the whole record that there is in reality no money judgment against any of the appellants, except Michael and

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Ellen Quill, so that the whole argument of the other appellants is foundationless. It is evident to our minds that the word "defendants," as used, only refers to those defendants we have just named.

The fact that the court did not make its finding within sixty days after the conclusion of the trial, does not prejudice the rights of the parties. *Jones v. Swift*, 94 Ind. 516; *Martin v. Pifer*, 96 Ind. 245; *Smith v. Uhler*, 99 Ind. 140.

It is now well settled that facts not stated in a special finding are here treated as not proved, and the finding is not vitiated by the failure to find upon all the facts embraced within the issues. If a fact is not found, it is deemed, as against the party having the burden, not to have been proved, and his remedy is by a motion for a new trial. *Glantz v. City of South Bend*, 106 Ind. 305; *Quick v. Brenner*, 101 Ind. 230; *Talburt v. Berkshire Life Ins. Co.*, 80 Ind. 434; *Ex Parte Walls*, 73 Ind. 95; *Vannoy v. Duprez*, 72 Ind. 26; *Martin v. Cauble*, 72 Ind. 67; *Stropes v. Board, etc.*, 72 Ind. 42; *Graham v. State, ex rel.*, 66 Ind. 386.

No substantial error was committed in sustaining the appellee's demurrer to the first paragraph of Michael Quill's cross complaint, for the second paragraph secured him all the benefit he would have been entitled to if both had been left standing, as the same evidence was admissible under the second paragraph. *Luntz v. Greve*, 102 Ind. 173.

Judgment affirmed.

Filed Nov. 17, 1886.

 Blackburn *et al.* v. Crowder *et al.*

No. 12,752.

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108	238
163	186

PLEADING.—*Written Instrument.*—*Filing with Complaint.*—*Sufficient Showing on Appeal.*—Where the complaint alleges that a copy of the written instrument counted on “is herewith filed,” and an instrument appears in the transcript, immediately following the complaint, corresponding with that alleged to have been filed, it sufficiently appears, on appeal, that the statute requiring written instruments or a copy to be filed with the complaint has been complied with.

REPLEVIN.—*Action on Bond.*—*Variance Between Exhibit and Complaint.*—*Demurrer.*—If, in an action upon a replevin bond, there is a variance between the recitals in the complaint and those in the copy of the bond filed with it, the latter will control, and the variance is not available on demurrer.

SAME.—*Allegations that Judgment is in Force.*—*Matter of Defence.*—Where a complaint on a replevin bond alleges that the defendants have failed and refused to pay the judgment rendered in the replevin proceeding, it is not necessary to aver that it is in force and unappealed from. If it is not in force for any reason, that fact should be made to appear by answer.

From the Lawrence Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellants.

J. C. Briggs and *W. C. Hultz*, for appellees.

MITCHELL, J.—There is but one error assigned on the record before us, and that is, that the court erred in overruling a demurrer to the complaint.

The action was founded on a replevin bond. The complaint sets out that in March, 1883, the appellees instituted proceedings in replevin in the circuit court of Lawrence county against Monroe Blackburn for the recovery of certain personal property, and that they procured the property to be seized by the sheriff upon a writ issued in that behalf. Blackburn thereupon as principal, with the other appellants as sureties, executed an undertaking to the sheriff, conditioned for the delivery of the property to the plaintiffs, without injury or damage, in case it should be adjudged that the plaintiffs were entitled to the possession thereof, and also for the

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payment of all sums of money which might be recovered against Blackburn in that action.

The complaint avers that such proceedings were thereafter had as that the plaintiffs recovered a judgment against the defendant Blackburn for four hundred and ninety dollars damages, and two hundred and sixty-four dollars and ninety-five cents costs.

The breach assigned is, that the defendants wholly failed to pay the damages and costs so recovered.

The first objection urged against the complaint is, that it does not identify the bond sued on, or show with sufficient certainty that the original or a copy was filed with the complaint.

An examination of the record leads us to conclude that this point is not well made.

The averment that a bond was duly executed on a given date by certain parties, is followed by these words, "a copy of which is herewith filed," after which the conditions of the bond alleged to have been filed are stated. Following the complaint, copied into the transcript, is a copy of a bond which corresponds in all essential particulars with that alleged to have been filed with the complaint. It has been repeatedly ruled that an instrument which appears in the transcript, thus identified and referred to, is within the requirement of the statute which prescribes that the original, or a copy of any instrument upon which an action is founded, must be filed with the complaint. *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212 (55 Am. R. 192), and cases cited.

As a further objection to the complaint it is said, the conditions of the bond, as they are recited in the body of the complaint, do not correspond with those which appear in the copy of the bond filed therewith. As it seems to us there is no substantial variance.

The complaint recites that "said defendants undertook to return said property to the plaintiffs if said suit should there-

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after be decided in favor of said plaintiffs, and also pay all damages and costs adjudged in favor of said plaintiffs." The corresponding condition of the bond filed is, "that said lumber shall not be injured or damaged, and that said Monroe Blackburn shall deliver said lumber to the plaintiffs in said proceeding, * * and said Monroe Blackburn shall pay all sums of money which they may recover in said action."

The criticism made at this point is, that the complaint recites that all the defendants undertook to return the property and to pay damages, while the obligation contained in the bond is, that Monroe Blackburn shall deliver, etc., and pay, etc.

The bond sued on created an obligation equally binding upon all who signed it. All were directly bound as original obligors, to perform each and every undertaking therein contained. Besides, the point which the appellants seek to make is not available on demurrer. Conceding, if need be, all that is contended for, the complaint stated a cause of action. The bond was the foundation of the action, and if there were any variance between the recitals in the complaint and those in the copy of the bond which was filed with it, the latter would control. 1 Works Pr., section 416.

It is contended further, that it does not sufficiently appear from the complaint that the judgment for damages, the non-payment of which is assigned as the breach of the bond, was rendered in the proceeding in which the bond sued on was filed.

The complaint alleges that the replevin suit was commenced in the Lawrence Circuit Court by the appellees, as plaintiffs, against Monroe Blackburn, as defendant, and that the undertaking sued on was filed in that proceeding. It avers that the venue of the cause was afterwards changed to the Greene Circuit Court, and that such proceedings were then and there had as that, on a date mentioned, it was adjudged "that said plaintiffs recover of and from said defendant Monroe Blackburn," etc. This makes it presumptively

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certain that the judgment mentioned was recovered in the replevin proceeding in which the bond was filed.

As it was averred in the complaint that defendants had failed, neglected, and refused to pay the judgment, it was not necessary, as is contended by the appellant, that the complaint should have contained an averment that the judgment, the non-payment of which was complained of, remained in full force and unappealed from.

If the judgment had been appealed from, that fact would have constituted no defence to an action on the bond. *Mull v. McKnight*, 67 Ind. 525; *Burton v. Reeds*, 20 Ind. 87. If the judgment had been set aside, reversed, or was for any other cause not in force, it remained for the defence to bring the facts forward in an answer. *Campbell v. Cross*, 39 Ind. 155; *Randles v. Randles*, 67 Ind. 434; *Padgett v. State*, 93 Ind. 396.

The judgment is affirmed, with costs.

Filed Nov. 17, 1886.

 No. 12,327.

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108	241
145	144
145	474
108	241
158	163
158	164

DRAINAGE.—Appearance.—Waiver of Notice.—Where, in a drainage proceeding, parties appear without objecting to the sufficiency of the notice, they waive their right to question it.

SAME.—Insufficient Notice to One not Available to Others.—The fact that one or more land-owners are not notified, will not vitiate the proceedings as to those having notice.

SAME.—Joint Motion Must be Good as to all Uniting.—A joint motion, or a joint assignment of error, which is not good as to all who unite therein, can not be sustained.

SAME.—Proof of Posting Notices.—Affidavit.—Proof of the posting of notices need not be made by affidavit, but may be made in any other legal method, and hence it is not essential that the record should contain affidavits of such fact.

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SAME.—*Judgment as to Notice.*—A formal judgment, declaring the notice sufficient, is not necessary where the judgment as rendered involves and adjudicates that question.

SAME.—*Second Notice.—When May be Ordered.*—Where the notice first given is not sufficient, the court may order a second notice, provided there is no unreasonable delay and no prejudice to substantial rights.

SAME.—*Defects in Notice not Available to Petitioner.*—The petitioner for drainage can not avail himself of any defect in the notice nor object to the manner in which it is proved.

SAME.—*When Petitioner May not Dismiss.*—The petitioner can not dismiss his petition after the report of the commissioners has been filed and confirmed, and rights have been acquired and money expended thereunder, notwithstanding the order approving the report has been vacated on the joint motion of himself and the commissioners for additional notice to omitted parties.

From the Hamilton Circuit Court.

W. Booth and F. M. Trissal, for appellants.

D. Moss and R. R. Stephenson, for appellees.

ELLIOTT, J.—The appellant Heiney petitioned the circuit court of Hamilton county for the establishment of a ditch, and an order was finally made establishing the ditch as prayed for. This appeal is from the judgment rendered in the proceedings put in motion by the petition of the appellant Heiney.

The cases which decide questions presented by a collateral attack upon the judgment of the court in drainage proceedings, are not of controlling force here, for this is a direct attack upon the judgment. An appeal from the judgment brings in direct review all questions properly saved by the appellants.

The notice originally given was that the petitioners would file a petition on a designated day, and, as against a direct attack, this was not sufficient, for the statute requires that the notice should be given after the filing of the petition. Acts 1883, p. 173; *McMullen v. State, ex rel.*, 105 Ind. 334.

The failure to give the notice required by law was a grave error, and would invalidate the proceedings as against a direct attack, unless corrected by subsequent proceedings. Notice is an essential requisite, and the omission to give the notice

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provided by the statute is one of a most material character, and these proceedings must fail unless the record shows that the notice was waived, or that subsequent proceedings cured the error, for here the case is before us for review by a direct appeal.

It is settled that notice in proceedings of this character may be waived. *Sunier v. Miller*, 105 Ind. 393. A notice, however, is not waived where the parties enter a special appearance and move to dismiss the proceedings for want of notice, and that is substantially what was done by some of the appellants in this case. There can, therefore, be no affirmance of the judgment on the ground that there was a waiver of notice, as to the parties who thus appeared and objected to notice. The question as to the sufficiency of the notice affects only those who did not waive it, for those who appeared without objection can not now successfully urge its insufficiency. Some of these appellants did, however, seasonably object, and as to them the question remains whether or not the subsequent proceedings cured the error in the original notice; but as to those who did not object, the judgment must be affirmed without further inquiry. *Updegraff v. Palmer*, 107 Ind. 181; *Higbee v. Peed*, 98 Ind. 420; *Bradley v. City of Frankfort*, 99 Ind. 417.

After the reference of the petition to the commissioners they reported that proper notice had not been given, and the court thereupon ordered another notice to be given. This notice included all of these parties except Thomas Stanford.

After this notice had been given, he, in conjunction with other parties, filed a motion to dismiss the proceedings, and assigned in support of the motion these grounds:

1st. Because there was no affidavit showing the posting of notices.

2d. Because no notice was ever given of the filing of the petition.

3d. Because all of the lands described in the additional notice were described in the petition.

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4th. Because the additional notice was not posted in three public places.

5th. Because notice was not given to some of the land-owners affected by the proceedings.

If this motion had been by Thomas Stanford alone, and had been followed by a separate assignment of errors, it would, perhaps, have entitled Thomas Stanford to a reversal; but it was a joint motion, followed by a joint assignment of errors, and as the motion was not well taken as to all who joined in it, there was no substantial error in overruling it, but if there had been it would not be available on a joint assignment of errors. We say the motion and assignment are joint, because Mary Stanford, Eli Keffer and another joined in it, and as the motion was not valid as to all of them, there was no error in overruling it.

The fact that one or more land-owners were not notified did not vitiate the proceedings as to those who were properly notified. *Grimes v. Coe*, 102 Ind. 406; *Town of Rensselaer v. Leopold*, 106 Ind. 29.

Proof of the posting of notices need not necessarily be made by affidavit, but may be made in any other legal method. *Meranda v. Spurlin*, 100 Ind. 380. It was not essential, therefore, that the record should contain affidavits proving the posting of notices.

As the motion presented a question for the decision of the court below, and as there is nothing in the record showing that the decision was wrong, we must presume that it was correct. It is a familiar rule that all reasonable presumptions will be made in favor of the rulings of the trial court, and this rule requires us to hold that the judgment of the court was sustained by sufficient evidence. Although there was no express or formal judgment declaring the notice sufficient, still, the judgment involved that question and settles it without any formal declaration to that effect. *Updegraff v. Palmer*, *supra*; *Jackson v. State, etc.*, 104 Ind. 516; *Carr*

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v. *State, etc.*, 103 Ind. 548; *Platter v. Board, etc.*, 103 Ind. 360; *Cauldwell v. Curry*, 93 Ind. 363.

As we have seen, the statute requires that notice of the filing of the petition shall be given, and this was the effect of the second notice, and it was one which the court had a right to direct, for we think there can be no doubt of the right of the court to order notice to be given where it is discovered that a notice previously given was not sufficient, provided there is no unreasonable delay and no substantial rights are prejudiced. Here, there was no unreasonable delay and no injury was done the appellants, for they were not in any manner misled.

The appellant Heiney was the petitioner, and he is in no situation to complain of the notice. The principle declared in *Sunier v. Miller, supra*, makes it clear that he can not avail himself of a defect in the form of the notice, nor successfully object to the manner in which it was proved.

Heiney moved to dismiss the proceedings, but his motion was overruled, and of this ruling he complains in a separate assignment of errors. Prior to the time this motion was made, the drainage commissioners had filed a report and an order was made approving the assessment. Subsequently, Heiney joined the drainage commissioners in a petition to vacate the report and order, representing that owners of lands benefited were not made parties. On this second petition an order was made vacating the former order, and directing that notice be given to those persons owning lands omitted from the first petition, and those persons came in and entered an appearance. This motion came too late. Rights had been acquired and money expended on the faith of the order made upon the first report, and justice requires that a petitioner should not be allowed to destroy rights which his own act had been the means of creating. The case is not at all like that of an ordinary civil action, for, in such a proceeding as this, the public and many persons have a common interest, and he who sets on foot the proceedings can not be

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permitted to end it to the injury of the public and others, by dismissing the petition. This is the doctrine held in *Crume v. Wilson*, 104 Ind. 583, and it rules this case.

There is no question of estoppel presented, except as to Heiney, although it is intimated in appellees' brief that the appellants are all estopped. We have no doubt that there are cases where a property-owner is estopped to question the validity of such proceedings as these, and we think that Heiney is barred, on the ground of estoppel, from impeaching the validity of the proceeding, but we do not think any of the other appellants are.

Judgment affirmed, with costs.

Filed Nov. 20, 1886.

No. 12,385.

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CONTRACT.—*Fraud.—Rescission.—Status Quo.*—A party who has been fraudulently led into the making of an entire contract, must, upon discovering the fraud, with reasonable promptness avoid the contract as a whole; but where no rights have been actually surrendered and no benefits acquired under it, no formal restoration of the *status quo* is necessary.

SAME.—*Equity.—Showing for Rescission.*—Where, in a case of equitable cognizance, a contract which ought not to be enforced is insisted upon, it is sufficient if the party whose rights are affected makes it appear that he has done nothing which makes it impossible for the court to decree a rescission, if the facts warrant it.

SAME.—*Divisible Contract.—Rescission as to Part.*—Where a contract is divisible, each part independent of the other and resting upon a consideration peculiar to itself, the injured party may retain the subject of one part, and, having tendered the consideration received, may treat another part as rescinded at law, or he may maintain a suit in equity to rescind one part while adhering to another.

SAME.—*Incomplete Written Contract.—When Regarded as Oral.—Evidence.*—Where parol evidence is necessary to make a contract complete by supplying an essential part, the contract will be regarded as in parol, except to the extent that it is controlled by the statute.

SAME.—*Consideration.—Burden of Proof.*—One who relies upon an oral con-

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126	208
108	246
128	135
128	246
128	600
108	246
141	480
108	246
154	194

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tract, or upon an agreement in writing which does not show upon its face that it was made upon an adequate consideration, must aver and prove that it is supported by a sufficient consideration.

ACCOUNT.—*Acknowledgment of Incorrect Amount.*—*Showing of Truth.*—*Consideration.*—*Notice.*—*Estoppel.*—A written acknowledgment, made without consideration, as to the amount of an account, does not preclude the party making it from showing, as against persons who have notice of its incorrectness before acting upon it, that the account as stated is not correct.

MORTGAGE.—*By Joint Purchasers of Real Estate.*—*Sale of Interest by One Purchaser.*—*Assumption of Debt by Grantee.*—*Principal and Surety.*—*Partition.*—Where two persons unite in the purchase of real estate, and execute their joint notes and mortgage for the unpaid purchase-money, and, after partition between themselves, one sells the part taken by him to a third person, who assumes the payment of his portion of the mortgage debt, such third person—the other purchaser having paid his equitable share of the debt—is primarily liable as principal debtor, and the land received by him must be first looked to before that held by the other, the latter standing as surety.

From the Switzerland Circuit Court.

W. S. Friedley and *C. A. Korbly*, for appellants.

C. E. Walker, for appellees.

MITCHELL, J.—In 1863 John Higham and William G. Krutz executed a mortgage to the executor of the estate of Nicholas Longworth, deceased, on a tract of land in Switzerland county, containing about 900 acres. The mortgage was to secure a debt—part of the purchase-price of the land—of \$30,000, evidenced by six promissory notes of \$5,000 each.

This was a proceeding by the executor to foreclose the mortgage.

Hosier J. Harris and Stephen H. Scranton were made parties defendants, they having acquired Krutz's interest in the lands mortgaged.

As between the Longworth estate and the defendants, it was found without serious controversy, that there remained due of the mortgage debt the sum of \$7,446.68.

A personal judgment for the amount found due was ren-

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dered against Higham and Krutz. This was followed by a decree of foreclosure against all the defendants.

The matters in contest arose between Higham on the one side, and Krutz, Harris and Scranton on the other.

These parties, by way of cross complaints against each other, and answers and replies thereto, set forth their respective claims at such length as to forbid any attempt to present even a synopsis of the pleadings.

It was conceded that Higham and Krutz purchased the land described in the mortgage from the executor of the Longworth estate, and received a warranty deed therefor as tenants in common. It was also conceded that Higham and Krutz afterwards made partition between themselves, each conveying to the other, as tenants in severalty, the shares agreed upon, and that Harris and Scranton subsequently purchased the part set off to Krutz, taking a conveyance therefor in which they assumed to pay his share of the unpaid mortgage debt.

Higham filed a cross complaint, in which he set up that he had paid his full share of the purchase-money, and that so far as it remained unpaid it was equitably the debt of Krutz. He prayed that the amount remaining unpaid should be adjudged a prior lien on the land set off to Krutz, and by him conveyed to Harris and Scranton. In their answers, and by way of cross complaint, Harris and Scranton set up a written agreement between Higham and Krutz, by the terms of which they claimed that Higham had agreed—or that the result of the agreement and settlement was—that so much of the mortgage debt as remained unpaid should fall upon him.

To this the latter responded by way of reply and answer, that Krutz had obtained the pretended settlement by fraud, undue influence, and without consideration, while he (Higham) was in a state of intoxication.

Issues were thus joined, which were tried by the court, who, upon request, made a special finding of the facts, and stated conclusions of law thereon adverse to Higham and wife.

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The facts found by the court, so far as they are material to develop the questions for consideration, may be stated in an abbreviated form as follows:

On the 12th day of October, 1863, Higham and Krutz purchased a tract of land called the "Mexico bottom" of the Longworth estate for \$40,000. Of this sum they paid, each paying the one-half, between the date of the purchase and March 1st, 1864, \$10,000, at which time they received a deed, and executed their joint notes, secured by mortgage on the land purchased, for the deferred payments. The notes were for \$5,000 each, payable in from one to six years inclusive. Subsequently the land was partitioned by agreement, Krutz taking 349½ acres, Higham 200 acres more, the latter paying to the former \$6,000 cash as the difference in the division of the land.

In 1870 Krutz conveyed the portion set off to him to Harris and Scranton for \$31,000, they agreeing, out of this sum, to pay his share of the unpaid purchase-money to the Longworth estate, and to render the balance to Krutz.

At the time Higham and Krutz purchased the land, they made an arrangement by which Krutz went into possession. As part of the arrangement the latter agreed to cut and sell timber, and make improvements on the land, and out of the anticipated profits pay the purchase-price. In 1870 Krutz claimed that instead of profits a loss of \$7,000 had resulted from the timber enterprise. He sent Higham a statement, which was afterwards designated as the "Mexico bottom bill," and demanded to be reimbursed for one-half of the alleged loss. Higham disputed the claim, and refused to pay.

Shortly after the conveyance from Krutz to Harris and Scranton, the latter undertook to ascertain how much of the unpaid purchase-money due the Longworth estate was chargeable to them under the assumption contained in their deed from Krutz. Higham and Krutz were unable to agree. Thereupon, on the 12th day of June, 1871, Krutz commenced a suit against Higham, claiming that the latter owed him one-

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half of the loss arising out of the timber adventure, besides \$6,000 on the agreement for partition, and \$3,000 which he claimed to have paid more than his share of the cash payment of the purchase-money on the land. In previous statements of account rendered by Krutz to Higham, no mention had been made of any claim for the two items last named, the matter in controversy being the account growing out of the timber transaction, or the "Mexico bottom bill."

On the 2d day of August, 1871, Higham, who was addicted to drink, met Krutz, upon the invitation of the latter, and being solicited by him took several drinks of whiskey, after which a settlement of the "Mexico bottom bill" was proposed. They were unable to agree. Continuing to drink, Higham proposed that if Krutz would dismiss his suit, he, Higham, would surrender certain notes, amounting to \$2,200 or \$2,300, which he held against Krutz. Higham had on deposit in a Cincinnati bank \$1,384.48 in money, which he also let Krutz have, taking the latter's note for its repayment, due in one year, without interest. Krutz thereupon accepted the surrender of his notes as proposed by Higham, and agreed to dismiss the suit. At the time this occurred Krutz had in his possession what purported to be a statement of the account of payments made by Higham and Krutz, respectively, to the Longworth estate. This account or statement was in the handwriting of the book-keeper of the Longworth estate, but it was not taken from the estate's books. It was made by the book-keeper at the dictation of Krutz, and was not a true statement, as Krutz knew.

At the time the lawsuit was settled, Krutz told Higham that he wanted an order from him to Harris and Scranton, so that he might get the money due him from them on the sale of his share of the land. He then produced the account made by the book-keeper, which had never been seen before by Higham, and, turning it over, wrote in part himself, and procured Higham to write the balance, as he dictated, the following:

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"MR. J. R. HARRIS—*Sir*—You will please pay Wm. G. Krutz the within bill, which is due him as made out by Longworth heirs, the within bill, which leaves Krutz \$14,682. You can deduct from the thirty-one thousand dollars; pay Krutz the balance, which leaves \$16,318, which you will owe Krutz and interest from the 1st of March, 1870. Wm. G. Krutz has agreed with John Higham, and Higham agrees Longworth's account is correct, making Wm. G. Krutz's account \$14,682, Higham's account \$13,064.44, March, 1st, 1870. (Signed) JOHN HIGHAM."

Higham, at the same time, by the procurement of Krutz and his son, signed the following written statement:

"This instrument of writing, made and entered into this 2d day of August, 1871, by Wm. G. Krutz and John Higham, is to certify that Wm. G. Krutz has this day executed to said John Higham, his promissory note, bearing even date herewith, for \$1,384.48—thirteen hundred and eighty-four dollars and forty-eight cents—due one year after date, and that they have made a full settlement of all their affairs and difficulties up to date, and said Krutz hereby agrees to said John Higham that he (Wm. G. Krutz) will withdraw his suit instituted against said John Higham and pay all costs that have accrued on the same, made by said Wm. G. Krutz, and the said John Higham hereby agrees that the account or statement rendered by the agent of Nicholas Longworth heirs as Cincinnati, showing the sum of \$14,682 as due from Wm. G. Krutz to the Longworth heirs, is correct and right, showing the matter in full up to the time said bill or statement was rendered, and the said John Higham hereby authorizes Jacob R. Harris to pay to said Wm. G. Krutz all his money due on this land purchased by him, deducting therefrom only \$14,682, as is shown by said Longworth statement, a copy of which is attached to this agreement. This is a full settlement of all claims and accounts between the said parties to date, including the Mexico Bottom Bill,

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all other accounts or claims of any description whatever for securities, notes or any other claims to date.

(Signed)

"WM. G. KRUTZ.

(Signed)

"JOHN HIGHAM."

This statement was written partly by Krutz, and in part by his son and book-keeper. A copy of the pretended Longworth account was attached to the agreement.

At the time Higham signed the paper showing the settlement he was drunk, having indulged his habit to excess at the request of Krutz. He knew that he had surrendered the notes above mentioned to Krutz, in settlement of the lawsuit, and that he had taken the note of the latter for \$1,384.48, for money which he had loaned, or "let Krutz have." He also knew that he signed some papers.

The court found that the statement, purporting to be from the books of the Longworth estate, was in fact Krutz's own statement copied in the handwriting of the book-keeper of the estate, and was known by Krutz to be false. This statement gave Krutz credit for a large sum above the amount he had actually paid, while it gave Higham credit for less than he had paid.

Krutz and his son, who assisted him in framing the agreement and procuring the signature of Higham thereto, were far superior to the latter in intelligence and business capacity, and previous to the suit between them, Higham had great confidence in Krutz.

Upon presentation of the agreement and settlement to the agent of Harris and Scranton by Krutz, finding the papers in the handwriting of two or three different persons, the agent at once sent for Higham, who, upon seeing the writings, immediately gave notice that they had been obtained by fraud, and that he should not consider himself bound by them.

Before anything was paid by Harris and Scranton, on the purchase of the land, they had notice that Higham repudiated the alleged account and statement, which Krutz had

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procured him to endorse at the time of the alleged settlement.

The court found that in June, 1870, Krutz paid \$400 on the note given by him to Higham for the \$1,384.48. That the latter still held the note for the unpaid balance of that sum. He has never tendered the note back, nor offered to have the suit involving the "Mexico bottom bill" reinstated, nor brought any suit to have the settlement or agreement rescinded.

It is also found that before the beginning of the foreclosure suit, Higham had paid and taken up three of the six \$5,000 notes, and the interest thereon, the date and amount of each payment being stated, and that there was due, of principal and interest, on the other three notes the sum of \$7,446.68.

As a conclusion of law, the court stated that Higham's land was primarily liable, and that he was personally liable before Krutz, because of the settlement and agreement of August 2d, 1871, and because he affirmed the settlement by retaining the note for \$1,384.48, above referred to, and receiving thereon \$400 in money, and because he made no effort to rescind the alleged settlement.

The appellants excepted to the conclusions of law. That the facts were correctly found is not questioned. The conclusions of law are the chief subjects of contention.

As may be seen, the learned judge who presided at the trial proceeded upon the assumption that, notwithstanding the appellant had paid his full share of the mortgage debt, yet, since it was also found that he had made the agreement above set out, the supposed benefits of which remained in his hands, he was thereby precluded from availing himself of the benefit of the very truth of the matter in controversy.

When applicable, there is no rule of law more firmly settled, or better supported on principle, than that which governed in the decision of the case below.

A party who has been overreached or fraudulently led into the making of an entire contract, must, with reasonable prompt-

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itude, upon discovering the fraud, repudiate, as well that part of the contract which is beneficial to him, as that which is not. He can not treat it as good in part and void in part, but must affirm or avoid it as a whole. The text-books and many decided cases affirm this rule. *Worley v. Moore*, 97 Ind. 15; *Himes v. Langley*, 85 Ind. 77; *Heaton v. Knowlton*, 53 Ind. 357; *Gregory v. Schoenell*, 55 Ind. 101; *Stedman v. Boone*, 49 Ind. 469; *Joest v. Williams*, 42 Ind. 565 (13 Am. R. 377).

If the results of a contract or settlement, by which a party is sought to be estopped, or which is set up to prevent the assertion of a right, are such as to be of no benefit to one, or no detriment to the other contracting party, that is, if nothing of value was parted with on the one hand, or received on the other, the contract may be disaffirmed without a formal restoration, on the principle that the law does not require an idle ceremony. Where a contract is void, or if, being merely voidable, no rights have been actually surrendered, and no benefits acquired under it, since in either case the contract has conferred nothing, there is nothing to restore. *McQueen v. State Bank*, 2 Ind. 413; *Barickman v. Kuykendall*, 6 Blackf. 21; *Mattox v. Hightshue*, 39 Ind. 95, 104; *McCracken v. City of San Francisco*, 16 Cal. 591; *Thurston v. Blanchard*, 22 Pick. 18; *Stevens v. Austin*, 1 Met. 557; *Wicks v. Smith*, 21 Kan. 412 (30 Am. R. 433).

It is to be observed, too, that the strict rules requiring a tender of all the benefits received under a contract as a prerequisite to the maintenance of a suit to recover property, the possession of which may have been parted with under a contract, have peculiar application to suits at law which proceed upon the theory that rescission has already taken place by the act of the party aggrieved.

Where a suit in equity is brought, the purpose of which is to secure the rescission of the contract, it is sufficient for the plaintiff to show in his complaint that he has substantially preserved the *status quo* on his part, and to offer to restore

that which he has received under the contract. In like manner, where, in a case of equitable cognizance, a contract which for any reason ought not to be enforced, is insisted upon, it will be sufficient if the party whose rights are to be affected by such contract, makes it appear that he has done nothing which has made it impossible for the court to decree a rescission, in case the facts warrant it. In such cases the decree of the court can be so moulded as to protect the rights of all the parties. *Shuee v. Shuee*, 100 Ind. 477, and cases cited; *Allerton v. Allerton*, 50 N. Y. 670; *Gould v. Cayuga Co. Nat'l Bank*, 86 N. Y. 75; *Hammond v. Pennock*, 61 N. Y. 145; *Masson v. Bovet*, 1 Den. 69.

A distinction is, therefore, to be observed between cases at law, which proceed upon the theory that a rescission has been accomplished by the act of the aggrieved party, and suits in equity, in which the decree of a court is invoked in order to obtain the rescission of a contract, or the cancellation of a settlement, and for the adjustment of the rights of the parties on such terms as shall be agreeable to equity and good conscience. In the one case, the injured party must have seasonably tendered to the other all benefits received, so as to have practically rescinded before suit brought. In the other, he must not have been guilty of *laches*, and he must have so far maintained the *status quo*, on his part, as that a court of equity can by its decree effectuate a rescission upon equitable terms. In either case, regard is to be had in applying the principles pertaining to rescission, whether the contract involved is entire and indivisible, or whether it is severable into independent constituents, involving different persons, and whether it rests upon a consideration susceptible of distinct apportionment. Whether a contract is entire or severable is ordinarily determined by inquiring whether or not it embraces one or more subject-matters, or whether the obligation it imposes is due at the same time and to the same person, and whether the consideration is entire or distinctly apportioned to each subject-matter and person. *Indianapolis*,

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etc., *R. W. Co. v. Koons*, 105 Ind. 507; *Rainbolt v. East*, 56 Ind. 538 (26 Am. R. 40).

"If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." 2 *Parsons Cont.*, p. 517; *Rainbolt v. East*, 56 Ind. 541.

Where either the subject-matter of the contract, or the consideration, is entire, there can be no partial rescission. These being entire, the rescission must be complete.

Where, however, a contract is divisible, one part having no necessary relation to the other, each resting upon a consideration peculiar to itself, and independent of the other, the injured party may retain the subject of one part, and, having tendered the consideration or benefit received, may treat another part as rescinded at law, or he may maintain a suit in equity to rescind one part upon equitable terms, while adhering to another independent part.

In such a case, each distinct stipulation, relating to a separate subject-matter, will be treated as a separate contract. *Goodspeed v. Fuller*, 46 Maine, 141; *Rand v. Webber*, 64 Maine, 191; *Miner v. Bradley*, 22 Pick. 457; *Morse v. Brackett*, 98 Mass. 205; *Bartlett v. Drake*, 100 Mass. 174 (1 Am. R. 101); *Johnson v. Johnson*, 3 Bos. & P. 162; *Perkins v. Hart*, 11 Wheat. 237; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452 (29 Am. R. 184); *Kerr Fraud*, pp. 336, 337; *Bigelow Fraud*, p. 413.

Having thus stated some general principles, we may now examine the contract, which is said to be an obstacle in the way of the appellants obtaining credit for payments actually made.

This was a proceeding to determine the rights of parties in a case of exclusively equitable cognizance.

Without regard to the form of the transaction, equity penetrates to the substance of what was done and intended by

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the parties, and, discarding mere form as useless, adjusts the rights of the parties according to the right of the case.

The appellees are insisting upon a contract which, admitting the truth of the facts found, defeats a clear equitable right of the appellant.

This contract is the basis of their cross complaint and answers. It is the foundation upon which they rest their entire contention. The contract relied on assumes to embrace three distinct subjects. In respect to each subject embraced, upon examination, it appears at once ambiguous and incomplete. Without resorting to parol evidence, it is in many respects unintelligible. For all legal purposes, it is of little or no more consequence than an oral contract. The consideration upon which the several stipulations rest does not appear upon the face of the writing, and hence it falls within the rule that where, in order to make a contract complete by supplying an essential part, resort to parol evidence is necessary, the contract is to be regarded as in parol, except to the extent that it is controlled by the statute. Section 4905, R. S. 1881; *Tomlinson v. Briles*, 101 Ind. 538, and cases cited.

The settled rule is, that one who relies upon an oral contract, or upon an agreement in writing which does not show upon its face that it was made upon an adequate consideration, must aver and prove that the contract is supported by a sufficient consideration. *Wheeler v. Hawkins*, 101 Ind. 486, and cases cited.

With these principles in view, it will be seen that the facts found come far short of making the contract relied on such an obligation as will serve to defeat the equitable rights of the appellants.

The writing first recites that Krutz had on that day executed his note to Higham for \$1,384.48. This was but the recital of a fact, and in and of itself is of no significance whatever. Having no apparent relation to anything else contained in the writing, it constitutes no basis for any con-

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tractual obligation. The facts as averred in the pleadings, and found by the court, are, that the note was given for money loaned by Higham to Krutz. Neither the writing relied on nor the facts as found establish any connection between the loan of money and any other subject embraced in the settlement.

The loan of money and taking a note for its repayment, was a transaction resting upon a separate and distinct consideration, entirely independent of anything else, so far as appears. There is, therefore, nothing in the writing which comprehends any element of contract so far as the loan is concerned. The money having been loaned and a note taken for its repayment, no useful purpose was subserved by reciting the fact in a separate instrument of writing.

The next subject covered by the agreement, and the only one which has any element of obligation or contract in it, is that contained by the recital, that the parties had made "a full settlement of all their affairs and difficulties up to date," and that Krutz had agreed to withdraw his suit against Higham and pay all costs. The consideration for this agreement does not appear on the face of the writing, but the special findings show that the surrender of certain notes held by Higham against Krutz was the consideration upon which the latter agreed to dismiss his suit.

The notes having been surrendered, the only legitimate purpose to be subserved by a written agreement was to evidence the obligation of Krutz to dismiss the suit and pay the costs.

The writing also recites that the statement of account, purporting to have been taken from the books of the Longworth estate, is correct.

This recital purports to be nothing more than the admission of an existing fact. It imposes no obligation upon any one. Upon its face as well as on the facts found, it is obviously without consideration. Until it was acted on to the

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detriment of some one who was ignorant of the facts, it was not binding. *Krutz v. Craig*, 53 Ind. 561.

No one can be precluded from showing the actual state of an account, because he may have gratuitously stated the amount of it different from what it in truth was, unless some element of estoppel intervenes.

Leaving out of view any question as to the manner in which the writing relied on was procured, neither the facts as they are found by the court, nor the written agreement as it appears, show any consideration for the acknowledgment that the pretended Longworth account was correct.

It thus appears that each subject-matter covered by the writing which is put forward to estop the appellee is entirely independent of the others, and that each, so far as it is supported by any consideration at all, is upon a consideration distinct from the other. There is, therefore, nothing in the facts found which precludes a court of equity from accomplishing exact justice between the parties.

That Higham received and retains \$400 of the money which he loaned to Krutz, and that he continues to hold the note for the balance, is in no way inconsistent with his right to have credit for the amount he has actually paid on the debt to the Longworth estate, nor does it afford any reason why he should be estopped from availing himself of the payments made to the Longworth estate, that the suit commenced against him by Krutz has been dismissed in pursuance of the written agreement. He paid the full consideration agreed upon for the dismissal, and the consideration paid has been received and retained by Krutz.

Upon the facts as they appear, we do not find it necessary to prolong this opinion by inquiring into the effect of the alleged fraudulent conduct of Krutz, in inducing the intoxication of Higham, and procuring the contract relied on to be signed by him while in that condition.

We have carefully considered the questions made upon the pleading in the case. Within the principles already stated,

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there was no reversible error in the rulings upon the pleadings. In the view we take of the matters in controversy, complete justice may be done by an application of the law to the facts as found by the court.

We recognize the rule insisted upon by the learned counsel for the appellee, that a party must fail or succeed upon the issues as they are made. This rule presents no obstacle to the conclusion at which we have arrived.

By his cross complaint the appellant Higham tendered as an issue that he had paid his full share of the debt to the Longworth estate, and asked as relief, that it be adjudged that to the extent that the debt remained unpaid it be decreed a prior lien on that part of the land set off to Krutz.

Harris and Scranton predicated their right, both in their answers to the cross complaint of Higham and in their cross complaint against him, upon the writing or settlement which they put forward. As we have before determined, this writing was incomplete and ambiguous, and did not upon its face import a consideration. It was therefore necessary that the parties putting it forward should aver and prove that it was made upon an adequate consideration. The burden was upon them to that extent. From the facts as found by the court, it must be assumed that the evidence failed to show any consideration for the acknowledgment made by Higham that the Longworth account relied on was correct. As the court found it was not correct in fact, that Krutz knew it, and that Harris and Scranton had notice before they acted upon it, the gratuitous acknowledgment can not be permitted to stand in the way of the appellant's equitable rights.

A suggestion is made that because the Longworth estate was not made a party to the appeal, an obstacle is presented against any reversal of the judgment. In this we do not concur. The controversy both in the court below and here is entirely between the parties to this appeal. The Longworth estate recovered a joint judgment on its complaint against Higham and Krutz, and had a straight decree against the

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land of all, the decree making no mention of the rights of the defendants between themselves. This was a separate judgment and decree in favor of the plaintiff below on his complaint. With this all parties are content. There was a separate decree against the appellant on the issues made on the several cross complaints filed. From this latter decree this appeal has been prosecuted. The plaintiff below has no concern with, or interest in, this appeal. His decree can not be affected, however the rights of the defendants below may be adjusted among themselves here. He was therefore not a necessary party to the appeal.

Harris and Scranton, having assumed to pay Krutz's share of the mortgage debt, are primarily liable as principal debtors for the sum remaining unpaid, Higham, as the special findings show, having paid his full share. That part of the land set off to Krutz, and now owned by them, is liable before that owned by Higham, who stands in all respects as the surety for Harris, Scranton and Krutz. *Birke v. Abbott*, 103 Ind. 1 (53 Am. R. 474).

Upon consideration of the appellant's petition to reconsider the order heretofore made in this cause, reversing the judgment below and ordering a new trial, it appearing by the record that the correctness of the special finding of facts is not disputed, and that the justice of the cause does not require that a new trial be ordered, within the ruling in *Buchanan v. Milligan*, *post*, p. 433, it is now ordered that the appellant's petition to modify the mandate heretofore entered, ordering a new trial, be sustained. The judgment of the court below is therefore reversed, with costs, with directions to the court below to re-state its conclusions of law in accordance with the opinion heretofore given, and to render judgment on the appellant's cross complaint on the facts found in his favor, saving his rights as surety as to the amount found due the Longworth estate.

Filed Sept. 15, 1886; motion to modify mandate sustained Feb. 16, 1887.

Claybaugh *et al.* v. The Baltimore and Ohio Railway Company *et al.*

No. 12,845.

CLAYBAUGH ET AL. v. THE BALTIMORE AND OHIO RAIL-
WAY COMPANY ET AL.

DRAINAGE.—*Pending Proceedings Under Prior Acts not Affected by Act of 1885.*—A drainage proceeding begun under the acts of 1881 and 1883, and pending when the act of 1885 (Acts of 1885, p. 129) went into force, was in no way affected by the latter act.

SAME.—*Report of Commissioners.—Failure to File at Time Fixed.—Dismissal of Proceedings.*—Where, in a drainage proceeding under the acts of 1881 and 1883, the report of the commissioners is not filed at the time fixed by the court, and no extension of time is then asked or other action taken, the petition may be dismissed on the motion of a party affected.

From the Marshall Circuit Court.

A. C. Capron, for appellants.

H. Newbegin, M. A. O. Packard and O. M. Packard, for appellees.

ELLIOTT, J.—In September, 1884, the appellants, proceeding under the drainage acts of 1881 and 1883, filed a petition for the establishment of a drain. On the 10th day of November, 1884, the appellee filed a demurrer to the petition, which was subsequently overruled, and an order was entered requiring the drainage commissioners to report on the third Thursday of the December term, 1884. No report was then filed, but on the 12th day of March, 1885, the commissioners came into court, made a showing as to their failure to report at the time designated, and asked that another time be fixed. Their request was granted, and the time for filing a report was fixed for June 6th, 1885. Before that date one of the drainage commissioners resigned, and on the 6th day of April, 1885, the Legislature so changed the law as to require the board of county commissioners to fill vacancies at a regular or special session. Acts of 1885, p. 129. It is, however, provided in the same act, "that where application has been made or proceedings are pending, or works for the purpose of drainage are in course of construction

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under said acts, the same may be carried on and completed, and assessments therefor collected according to the provisions of said acts, and shall not be affected by this act." On the 24th day of June, 1885, nineteen days after the time fixed for making the report, the commissioners came into court and asked a further extension of time. The court refused to grant this request, and on the motion of the appellee dismissed the proceedings.

The case is not affected by the act of 1885, for by the provisions of that act, quoted by us, the proceedings might have been carried on under the acts previously adopted. No rights were taken from the petitioners by the act of 1885, for these were expressly saved.

There was no error in dismissing the petition. This is expressly decided in *Munson v. Blake*, 101 Ind. 78, where it was said: "No order was made at any time by the court extending or changing the time so designated. Commissioners of drainage can not, under this statute, violate or ignore the order of the court fixing the time for the filing of their report, and present a report when it suits their pleasure or convenience. To permit them to do so would render the statute subject to great abuses. It would in many cases result in requiring the constant attendance in court of persons desiring to remonstrate against the report, and ceaseless vigilance on their part to avert action thereon in their absence. No such inconveniences or perils should be imposed upon them, and none will be imposed if the provision of the statute is, as it must be, complied with."

If the drainage commissioners do not report at the time designated, it may be that the petitioners could avert a dismissal by appearing at that time and asking an order against the commissioners; but, however this may be, they can not subsequently come into court, and, as of right, obtain such an order. The reasoning of the court in *Munson v. Blake*, *supra*, forcibly applies here, and conclusively shows that if no report is made at the time designated, and no action is then

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taken, the defendants are not bound to constantly watch the proceedings, but may treat them as having been discontinued. Of course they may waive the failure to report at the proper time, but there is no waiver where the objection is promptly made, nor was there any abuse of discretion by the court in refusing to grant further time.

Judgment affirmed.

Filed Nov. 18, 1886.

No. 12,563.

BAILEY v. SANGER ET AL.

WILL.—Construction.—Independent Clauses.—Where the two clauses of a will create an estate in the several devisees named, and they are not united grammatically or by the expression of a common purpose, each clause must be considered and construed separately, and without relation to the other, even though the testator may have had the same intention in regard to both.

SAME.—When Subsequent Clauses will not Control.—Where an interest or estate is given in one clause of a will in clear and decisive terms, it can not be taken away or cut down by raising a doubt upon the meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words giving the interest or estate.

SAME.—Life-Estate in Widow, with Remainder Over.—Property not Devised Follows Law of Descent.—Where, by the first clause of a will, the testator devised one undivided third of certain real estate to his wife during her life, with remainder over to their only child, a daughter, but making no devise over or other limitation upon the estate, the widow, on the death of the daughter, unmarried and childless, inherited the same by descent as sole heir.

SAME.—When Widow not Entitled to Life-Estate.—Where, in such case, by a second clause of his will, the testator devised the remaining two-thirds of his real estate to his daughter, and in the event of her death before, with no children living at, the death of his wife, "then the share of said property, above devised to my said daughter, is hereby devised and bequeathed to my father," etc., the widow, on the happening of the contingency, is not entitled to a life-estate in such two-thirds.

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SAME.—Possession of Devisees.—The rule, that where a devise to one who stands in the relation of heir to the testator is to take effect in possession only upon the death of the testator's wife, the latter takes a life-estate by implication of law, has no application where, by the terms of the will, the devisees are entitled to possession immediately upon the death of the testator.

From the Lake Circuit Court.

H. A. Gillett, for appellant.

J. W. Youche, for appellees.

MITCHELL, J.—The controversy between the parties here involves the construction of the first and second clauses of the last will and testament of Sanford Sanger, deceased. These are as follows:

"Item 1st. I give and devise to my beloved wife, Amelia, in lieu of her interest in my lands, one-third of the farm on which we now reside, situated in Cedar Creek township, Lake county, Indiana; also one-third part of ten acres of timber lands situated in the same township and county, to have and to hold the same during her natural life as aforesaid. I direct that all my just debts be paid out of the avails of my personal property; and my said wife to have the balance of my personal property, after the payment of my debts as aforesaid. At the death of my said wife, the real estate aforesaid, I give and devise to my daughter, Sarah.

"Item 2d. I devise and bequeath to my daughter, Sarah, two-thirds of all the real estate of which I may die seized, it being two-thirds of the farm on which we now live; also, two-thirds of ten acres of timber land, all of said real estate being situated in Cedar Creek township, Lake county and State of Indiana. If my said daughter, Sarah, should die before the decease of my wife, leaving no children living at the death of my said wife, then the share of said property, above devised to my said daughter, is hereby devised and bequeathed to my father and mother, if living, or to the survivor of them, or if neither of them be living, then the same is to be divided equally between my brothers and sisters,

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share and share alike, or to the heirs of those that are deceased in the same ratio.

"If my said wife should not survive me, then I devise and bequeath my property devised to my said wife, to my daughter, Sarah, if she be living; if not, then to descend to my parents if living, or to the survivor of them, or if neither of them, then the same to be inherited by my brothers and sisters in common."

The claim of the widow, who, subsequent to the testator's death, intermarried with Joseph Bailey, is two-fold in its character.

In the first paragraph of her complaint, she alleges the death of the testator, exhibits the will, which she avers was duly admitted to probate, and says that she and her daughter both survived the testator, but that the daughter has since died unmarried and childless. The widow elected to take under the will. It is averred that in her lifetime the daughter,—her guardian acting for her,—instituted proceedings in partition, which resulted in setting off to the widow one-third of the devised lands, and to the daughter two-thirds. That since the death of the daughter, the appellees, the brothers and sisters of the testator, his father and mother having died, are claiming that the appellant has only a life-estate in the one-third of the lands devised and subsequently set off to her, whereas her claim is, that by virtue of the premises she owns one-third of the lands devised, in fee.

This paragraph proceeds upon the theory, that by the first item of the will the appellant took an undivided one-third of the land for life, with remainder over to her daughter, that this remainder being vested in the daughter, and not otherwise disposed of by the will, descended upon the daughter's death to the appellant, her mother and sole heir.

The second paragraph sets up substantially the same facts as the first. As a legal conclusion flowing from the facts stated therein, the appellant claims that she became entitled to a life-estate in all of the testator's lands. This claim rests

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upon the express devise of one-third for life, contained in the first clause of the will, and upon an implication which it is said arises from the language contained in the second item.

The first clause of the will is reasonably plain and unambiguous. By its terms the testator devised to his wife a life-estate in one-third of the lands therein mentioned, with remainder over upon the death of his wife, to his daughter. As the life-estate of the wife was carved out of the one-third only, the remainder over to the daughter related to the one-third out of which the life-estate had been taken. The estate in remainder is to be confined to the lands out of which the precedent estate had been carved. Thus, by the first item of the will, a complete disposition was made of the undivided one-third of the testator's land.

By the second clause, the title to the undivided two-thirds, which so far remained untouched by the testament, was devolved upon the testator's daughter, at his death, contingent upon the death of the daughter before the decease of the testator's widow; and upon the further contingency that at the death of the widow, the daughter should have no living child or children, the title to the share "above devised" was to vest in the father and mother of the testator, or the survivor of them, or in the event of the death of both, then in his brothers and sisters.

Under the well settled rule that the validity of a contingent estate, created by a will, is to be determined by considering the terms of the will alone, and not by what might have happened, or what actually did happen, it might have become a subject deserving consideration, whether upon the several contingencies mentioned, the remainder over was valid within the provisions of section 2962, R. S. 1881. As, however, no question is made in regard to the validity of the devise over, we intimate no opinion in that respect. *Nightingale v. Burrell*, 15 Pick. 104; Gray Rule against Perpetuities, section 201.

In our opinion the two clauses of the will, above set out,

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are entirely independent of each other. Each clause creates an estate in the several devisees therein named. There is no apparent design to connect them, nor are they united grammatically, or by the expression of a common purpose. In such a case each must be considered and construed separately, and without relation to the other, even though it may be conjectured that the testator had the same intention in regard to both. 3 Jarman Wills, p. 708.

The question then comes to this: Was the remainder in the one-third, which the daughter took under the first clause of the will, carried over to the brothers and sisters, upon the happening of the contingencies provided for in the second clause? If it was, the appellant's interest in the land is confined to a life-estate in the undivided one-third, which she took under the will. If it was not, then upon the death of the daughter without other heirs, the appellant, as mother and sole heir, took such remainder by descent cast.

As we have already seen, the first clause of the will made a complete disposition of the testator's entire estate in the undivided one-third, vesting an absolute and unconditional fee simple in the remainder in his daughter.

Where an interest or estate is given in one clause of a will, in clear and decisive terms, "such interest or estate can not be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate." *Thornhill v. Hall*, 2 Clark & Fin. 22; *Collins v. Collins*, 40 Ohio St. 353.

The second clause deals exclusively with the remaining two-thirds. After devising the two-thirds to his daughter, the language is, after reciting certain apprehended contingencies, "then the share of said property above devised to my said daughter is hereby devised and bequeathed to my father," etc. In our opinion this excludes the idea that it was the purpose of the testator to deal with anything in the second

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clause except the very subject then before him, namely, the undivided two-thirds. It may well be supposed that he was not unwilling that his wife, in the event of the death of his daughter without other heirs, should inherit an estate in his lands equal to that which she would have been entitled to absolutely as widow. We can not assume, without finding the intent expressed in terms, that it was the purpose of the testator not only to confine his wife to an estate for life in the one-third of his lands, but in addition to put his whole estate in such condition that she could by no possibility thereafter inherit anything upon the death of her only daughter. Even if such an intent was manifest, yet, before it could have been effectual, there must have been an actual, valid and unambiguous disposition of the estate over, after vesting it absolutely in the daughter. Property not otherwise disposed of follows the law of descent upon the death of the owner. *Parks v. Kimes*, 100 Ind. 148.

While it is true, the primary object in the construction of wills is to arrive at, and give effect to, the intention of the testator, as gathered from the whole instrument, it is nevertheless essential in order that such intention may be made effectual, that the established rules of law in respect to the transmission and descent of property be not disregarded.

The law does not favor the suspension of estates, hence where lands are devised, unless it plainly appears by a devise over, or by words of limitation, or otherwise in the will, that the estate of the first taker was to be less than an estate of inheritance in fee simple, his estate will not be cut down merely by implication.

As there was no devise over, or other limitation upon the estate which the daughter took under the first clause of the will, she died the owner in fee of the undivided one-third of the testator's land, and upon her death the appellant inherited this one-third as the sole heir of her daughter.

In respect to the appellant's second proposition, while not denying the rule, that where an estate is devised to one who

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stands in the relation of heir to the testator,—the devised estate to take effect in possession only upon the death of the testator's wife,—the wife takes a life-estate by implication of law, it is sufficient to say the case before us is not one which calls for the application of the rule. The possession of the estate disposed of by the second clause of the will was not postponed until the death of the testator's wife. The daughter, as devisee under this clause, was entitled to the possession of the two-thirds of the land immediately upon the death of the testator, and assuming the devises over to have been valid, the title and right to possession were carried to the several persons successively designated, upon the happening of the contingencies giving them the right to the estate.

There is no language in the second clause of the will which denotes a purpose to suspend the right of enjoyment in the devisees of the two-thirds during the lifetime of the widow.

The conclusion thus reached is, that the ruling was right upon the second paragraph, and that the court below erred in sustaining the demurrer to the first paragraph of the complaint.

For this error the judgment is reversed, with costs.

Filed Nov. 19, 1886.

No. 12,601.

THE INDIANA INSURANCE COMPANY v. CAPEHART.

CORPORATION.—*Agency in County Must Exist when Suit is Brought.*—In an action against a corporation under section 309, R. S. 1881, an agency for the transaction of business must be shown to exist in the county at the time suit is commenced.

INSURANCE.—*Proof of Loss.—Conditions Precedent.—Performance.—Waiver.—Pleading.*—Where a policy of insurance stipulates that the assured shall, as soon after a loss as possible, render a statement, under oath, concerning the origin and circumstances of the fire, stating the interest of the assured or others in the property, with its value, and that the insurance shall not be due or payable until sixty days after proof of loss, such

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stipulations are conditions precedent to a right of recovery, and the complaint, in an action on the policy, must affirmatively show a performance or waiver of the conditions.

SAME.—Evidence.—Power of Adjuster to Waive Preliminary Proof of Loss.—

Evidence that, in pursuance of a stipulation in the policy to that effect, the assured submitted to an examination under oath, at the request of the company, and was then notified by the agent, who had authority to make the examination and to adjust losses, that nothing further would be required, sufficiently establishes the authority of the agent to waive the other preliminary proof of loss required by the policy.

*SAME.—Stipulation Against Waiver by Agent.—*In such case, a stipulation in the policy, that "no agent has power to waive any condition of this contract unless by written endorsement thereon," refers to conditions essential to make the contract obligatory and binding between the parties in the first instance, and to its continuing force and obligation until a loss occurs, and does not refer to stipulations requiring the assured to make proof of loss in a specified manner.

From the Pike Circuit Court.

V. Carter, for appellant.

E. A. Ely and J. W. Wilson, for appellee.

MITCHELL, J.—To a complaint founded on a policy of insurance, the appellant pleaded in abatement of the action, that it was a domestic corporation, having its principal office in the city of Indianapolis, and that at the time the suit was commenced it had no office or agent for the transaction of business, in the county of Pike, where the suit was commenced.

To this plea the plaintiff below replied, that at the time the policy in suit was issued, one John M. Doyle was the duly authorized agent of the appellant in and for the county of Pike, and as such signed and delivered the policy which was the foundation of the action. That after the loss occurred, Doyle who was still the appellant's agent, attempted to negotiate a settlement of its liability under the policy. That after the complaint was filed a summons was duly issued and served on Doyle, "who was the agent of the defendant as aforesaid," and that there was at the time no other officer or agent of the defendant in Pike county. The repli-

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cation contained an averment that service was also had upon the president of the company, in Marion county.

The court overruled a demurrer to this reply, and this ruling is urged as a ground for reversal.

Section 32 of the civil code, R. S. 1881, section 309, provides, in substance, that when a corporation has an office or agency in any county for the transaction of business, any action growing out of the business of such office may be brought in the county where the office or agency is located, and service upon any agent or clerk employed in such office shall be sufficient service upon the principal.

Fairly construed, the reply amounts to nothing more than an argumentative denial of the plea in abatement. It shows that at the time the policy was executed, as well as after the loss occurred, and when the summons was issued and served, Doyle was the agent of the appellant in Pike county. This was all that was required to give the circuit court in Pike county jurisdiction of the defendant by its process. We agree with appellant's counsel, that an agency must have existed at the time suit was commenced. The reply sufficiently shows that it did exist.

Upon a trial of the issue joined on the plea in abatement, the court found for the plaintiff, and gave judgment that the defendant should answer over.

In the policy under which the loss occurred, there was a stipulation to the effect that as soon after a loss as possible the assured should render a particular statement under oath, giving such information as the assured may have been able to obtain concerning the origin and circumstances of the fire, stating also the title and interest of the assured and others in the property, together with its value. It also provided that the claim should not be due or payable until sixty days after the full completion of all the foregoing requirements contained in the policy.

In the first paragraph of the complaint, it was averred gen-

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erally, that the plaintiff had performed all the conditions of the policy, required to be performed by her.

The second paragraph set up facts which amounted to a waiver of the conditions requiring formal proof of loss, as stipulated for in the policy.

With the general denial, the defendant answered in bar, that the plaintiff had not, prior to the commencement of the action, complied with the conditions of the policy, by making proof of the loss, etc.

On motion this paragraph of the answer was stricken out. This ruling is presented as a subject for consideration. Furnishing the proofs stipulated for in the policy, was a condition precedent to the plaintiff's right of recovery. The claim for loss was not due until sixty days after such proof was furnished. It was therefore essential to the sufficiency of the complaint that the plaintiff should affirmatively show a performance of the conditions upon which the claim matured, or that a performance had been waived. *Board, etc., v. Hammond*, 83 Ind. 453; *Home Ins. Co. v. Duke*, 43 Ind. 418.

The plaintiff having averred performance in one paragraph and a waiver of the conditions in the other, the issue in that regard was completed by the general denial, without the necessity of a special affirmative answer. There was, therefore, no error in sustaining the motion to strike out the answer which set up failure to perform the conditions by making proof, etc.

Lastly, it is claimed that the evidence does not sustain the verdict of the jury, and that hence the court erred in overruling appellant's motion for a new trial.

The point chiefly contested was, whether or not there had been a waiver of the conditions of the policy requiring proofs of loss.

Appellant insists: 1. That the evidence fails to show a state of facts which in themselves constitute a waiver. 2.

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That the special agent who waived the proofs of loss had no authority to that end, even conceding that the facts proved constitute a waiver.

Concerning the first proposition, the plaintiff testified, that immediately after the fire she gave notice of the loss to the local agent, from whom she had received her policy. That shortly thereafter a Mr. Fulton, who represented himself to be the adjuster of the insurance company, came to the town in which the plaintiff resided, examined duplicate bills of her stock which she had procured, and made an estimate of her sales and the amount of stock on hand at the time of the fire. He then prepared a written statement which she signed and verified, and which Mr. Fulton retained. Thereupon he told her that she had nothing more to do, that the company would settle the loss satisfactorily, and that she would receive a check for the money in a short time.

The testimony of Mrs. Capehart, although contradicted to some extent by Mr. Fulton, is corroborated by Mrs. Welden. The jury evidently accepted her statement as true.

Assuming the facts to be as detailed by the plaintiff, the finding that there was a waiver of the stipulation requiring preliminary proofs of loss, other than the written statement taken by Mr. Fulton, is abundantly sustained.

The policy contained a stipulation that the assured should submit to an examination under oath, at the request of the company. This was inserted doubtless with the view that the company would thereby be enabled to obtain more full and complete proofs, concerning the origin and circumstances of any fire which might occur, and the nature and extent of the loss, than would be afforded by the formal proofs which the assured might furnish. Having taken and retained in its possession the examination so provided for, the production of other preliminary proofs was rendered practically useless, and having notified the plaintiff that nothing further would be required of her, it must be deemed that the facts constitute a waiver. *Security Ins. Co. v. Fay*, 22 Mich. 467 (7 Am.

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R. 670); *Priest v. Citizens' M. F. Ins. Co.*, 3 Allen, 602; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108 (28 Am. R. 535); *Badger v. Phoenix Ins. Co.*, 49 Wis. 396.

The proof does not show what the precise powers of Mr. Fulton were, but it is not denied that he was acting for the company when he took the examination or sworn statement of Mrs. Capehart. He had been employed by the appellant to adjust losses, and having the authority, as it is conceded he had, to act upon the subject of taking proofs concerning the loss, it must be held that he had power, after making the examination provided for in the policy, to dispense with the other proofs stipulated for therein. *Ætna Ins. Co. v. Shryer*, 85 Ind. 362, and cases cited.

Counsel for appellant, however, contend that the agent had no power to waive the production of other proofs, because the policy contained on its face the following printed stipulation: "No agent has power to waive any condition of this contract unless by written endorsement thereon."

We are not required in this case to enter into an examination of the power of agents to waive conditions contained in insurance contracts, by acts *in pais*, when such contracts contain stipulations concerning the power of its agents of the character above referred to. It is sufficient to say that limitations of the character above set out are usually held to refer to the power of agents to waive such conditions in the policy as are of the essence, and enter into and form a part, of the contract of insurance, such as are essential to make the contract obligatory and binding between the parties in the first instance, and those upon which its continuing force and obligation are dependent, until a loss occurs.

Concerning conditions of that description, and the power of an agent to waive them, except in the manner provided, much discussion and some contrariety of opinion may be found. *Blake v. Exchange Mut. Ins. Co.*, 12 Gray, 265; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Palmer v. St. Paul F. &*

Fletcher *et al.* v. Sharpe *et al.*

M. Ins. Co., 44 Wis. 201; *Susquehanna Ins. Co. v. Staats*, 102 Pa. St. 529; *Universal Ins. Co. v. Weiss*, 106 Pa. St. 20.

Stipulations which do not properly amount to conditions upon which the inception or obligation of the contract depends, and which merely require that something should be done by the assured in the way of furnishing proofs or information to the insurer regarding the circumstances and origin of the fire, the nature and extent of the loss, may be and are waived when other proofs or information in respect to the same matter are accepted or received without objection by an agent of the company who is duly authorized to act with reference to that subject. *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102 (11 Am. R. 469); *May Ins.*, section 511.

The purpose of requiring proof of loss by the assured having been subserved in a manner provided for in the policy, the agent of the company charged with the duty of inquiring concerning that very matter, having made inquiry, and having induced the assured to believe that no other proof would be required, the company must now be held estopped to say that such agent was not authorized to dispense with the formal proofs stipulated for in the policy, by accepting for the company other proofs in its stead.

There was no error. The judgment is affirmed, with costs.

Filed Sept. 22, 1886; petition for a rehearing overruled Nov. 20, 1886.

No. 12,628.

FLETCHER ET AL. v. SHARPE ET AL.

108 276
149 547

BANK.—Insolvency.—Trust Fund Deposit.—Preference.—Debtor and Creditor.—
An administrator, or other person, who makes a general deposit of trust funds in a bank, thereby creating the relation of debtor and creditor between himself and the bank, both acting in good faith, is not entitled

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to any preference over other general depositors in the event the bank becomes insolvent.

From the Marion Superior Court.

J. P. Baker and *F. Winter*, for appellants.

B. Harrison, *W. H. H. Miller* and *J. B. Elam*, for appellees.

MITCHELL, J.—Prior to the 15th day of July, 1884, Fletcher and Sharpe were engaged as partners in conducting a general banking business, in the city of Indianapolis. Having conducted the bank to insolvency, they procured the Marion Superior Court to take the administration of its affairs, by mutually consenting that one of the judges of that court should appoint a receiver and take possession of its assets. Through its receiver the court continues in the administration of the insolvent concern.

On the 29th day of September, 1884, while the affairs of the bank were thus in the custody of the court, Mahlon H. Floyd and Jay G. Voss, administrators of the estate of Gustavus H. Voss, in an intervening petition to the court, alleged that soon after their appointment, they had, as such administrators, deposited in Fletcher & Sharpe's bank about \$40,000 of the funds of the estate, for safe-keeping. They alleged that at the time of receiving such fund, Fletcher & Sharpe had full notice that it belonged to the estate, and that the same was placed in their custody by the petitioners in their trust capacity, and they aver that the fund was so received by Fletcher & Sharpe.

The petition alleges the subsequent insolvency of the bank, and the appointment of William Wallace as receiver, and that as such receiver he has the possession of its assets. It is shown that about \$22,000 of the money so deposited remained in the bank at the time of its suspension. The petitioners aver that the receiver has in his possession a large amount of assets, consisting of bills receivable, and choses in action, in which Fletcher & Sharpe had wrongfully in-

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vested the moneys so deposited by the petitioners. They ask that the court shall order the receiver to pay over to them the full sum of money so deposited, and yet remaining unpaid by the bank at the date of its suspension.

An issue was made by a denial on behalf of the receiver, and upon a hearing the prayer of the petition was denied, and judgment rendered that the petitioners take nothing.

The question arises upon the evidence. There was no disagreement as to the material facts in the case. The funds were deposited in the bank from time to time to the credit of the petitioners. It may be assumed that the account was opened and continued on the books of the bank, in the name of the petitioners, as administrators of the estate of Voss, although this does not very distinctly appear. It does appear, however, that Fletcher & Sharpe were notified when the first deposit was made, that the funds then deposited, and such as should thereafter be deposited by the petitioners, were and would be the funds of the estate, and a trust fund, and that no checks would be drawn upon it, except for the purposes of the estate, and that all checks would be signed by the petitioners as administrators. An ordinary bank account of debit and credit was kept, the petitioners having the customary pass-book evidencing the amount of their deposits from time to time. When the bank suspended the amount due the petitioners on their account was \$22,042.52. There went into the hands of the receiver when he took possession a sufficient sum of money to have paid the amount due the petitioners. The total amount of assets was about \$500,000. The liabilities aggregated \$1,500,000.

Upon this state of facts it is now argued that the petitioners were entitled to an order giving them a preference over other general depositors.

Whether the loss to the fund, occasioned by the suspension and insolvency of the bank, will ultimately fall upon the petitioners, is a question in no way directly involved in the decision of this case.

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The principles which determine the liability of trustees who become depositors of trust funds were considered to some extent in the case of *Naltner v. Dolan*, *post*, p. 500, and cases cited.

Nor does the case involve any question as to the right of the bank to appropriate the fund for an indebtedness due from the depositors, as in *Bundy v. Town of Monticello*, 84 Ind. 119.

There are many cases in which the question has arisen as to the equitable rights of *cestuis que trust* to pursue a trust fund, which has been misapplied or diverted by the trustee, or which the creditors of the latter are seeking to subject or appropriate to the payment of debts due them. The general doctrine is well established, that equity will follow a fund through any number of transmutations, and preserve and protect it for the real beneficiary, so long as such fund can be identified and followed. *National Bank v. Insurance Co.*, 104 U. S. 54; *Pennell v. Deffell*, 4 DeGex M. & G. 372; *Frith v. Cartland*, 2 Hem. & M. 417; *Knatchbull v. Hallett*, Law Rep. 13 Ch. D. 696; *Taylor v. Plumer*, 3 M. & S. 562; *Farmers' and Mechanics' Nat'l Bank v. King*, 57 Pa. St. 202; *Van Alen v. American Nat'l Bank*, 52 N. Y. 1; *Naltner v. Dolan*, *supra*.

The class of cases above cited are relied upon by the appellants for a reversal of the ruling below. The distinction between the cases relied on and the case being considered is obvious.

Those were cases in which the aid of a court of equity was invoked by the rightful owners, to preserve a trust fund from misappropriation by a trustee or his creditors. This is a case in which trustees, with others, have become general depositors in a bank which has become insolvent, and whose assets are now in the hands of a receiver for distribution among all its creditors according to law. The question is, do persons who become general depositors of trust funds in such manner as to create the relation of debtor and creditor

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between themselves and the bank in which the funds are deposited, stand upon a different level from other general depositors?

There is no question but that the fund was properly deposited. The propriety of the conduct of the trustees in making the deposit, or of the bank in receiving it, is not in dispute, nor does the evidence suggest any wrongful misappropriation or diversion of the fund either by the bank or the trustees.

When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust moneys, or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund. If in receiving a trust fund a bank acted with knowledge that it was taking the fund in violation of the duty of the trustee, the rights of the *cestui que trust* might be different. In respect to such a case, we decide nothing here.

In this case, where no impropriety is imputed to the bank in receiving the money, it became the debtor of the petitioners, and its debt to them was of the same character as its debt to any other depositor, and must be paid in the same proportion. The rights of other creditors stand on a level with those of the petitioners, and are to be guarded and protected by the court with the same vigilance. *McLain v. Wallace*, 103 Ind. 562; *National Bank v. Ellicott*, 31 Kan. 173; *Aetna Nat'l Bank v. Fourth Nat'l Bank*, 46 N. Y. 82 (7 Am. R. 314); *Attorney General v. Continental L. Ins. Co.*, 71 N. Y. 325 (27 Am. R. 55); *Bank of the Republic v. Milard*, 10 Wall. 152.

There was no error. The judgment is affirmed, with costs.
Filed Nov. 20, 1886.

END OF THE MAY TERM, 1886..

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1886, IN THE SEVENTY-
FIRST YEAR OF THE STATE.

No. 12,866.

HENRY, ADMINISTRATOR, v. STEVENS.

PLEADING.—*Allegations of Title, General and Specific.*—A general allegation of title is controlled by the specific facts pleaded.

SAME.—*Scope and Tenor.*—A pleading is to be judged from its general scope and tenor.

FRAUDULENT CONVEYANCE.—*Valid Between Parties.*—A fraudulent conveyance is valid between the parties.

● **DEED.**—*Parol Evidence Can Not Defeat.*—The conveying part of a deed can not be overthrown by parol evidence.

REAL ESTATE.—*Possession of Grantor Not Adverse to Grantee.*—The continued possession of a grantor can not be adverse to his grantee.

RENT.—*Demise by Life Tenant.*—*Death During Term.*—Where a lessor, who is a life tenant of the land demised, dies before the lease has expired, his representative may recover rent which had accrued prior to his death.

From the Fayette Circuit Court.

R. Conner and *H. L. Frost*, for appellant.

J. I. Little and *C. Rochl*, for appellee.

(281)

108	281
130	501
108	281
122	474
122	486
108	281
140	412

108	281
169	643

Henry, Administrator, v. Stevens.

ELLIOTT, C. J.—This action was commenced by the appellant before a justice of the peace, and is founded on a promissory note executed by the appellee to James D. Henry, guardian of Wells Stevens. The appellee filed an answer alleging that the note was executed in payment of rent due the ward of appellant; that the rent for which the note was executed was for the term of one year; that before the expiration of the year for which the land was demised, Wells Stevens died; that he was the owner of a life-estate only in the land; that this estate terminated at his death; that the plaintiff was entitled to the rent which accrued prior to his death, to wit, \$120, and that of this sum the defendant had paid \$100. For the rent unpaid the defendant offered to confess judgment. The case was certified to the circuit court, and there the appellant filed a reply setting forth, in substance, these facts: That on the 6th day of April, 1861, Wells Stevens executed to the defendant a deed for the land in controversy; that the deed was executed for the purpose of defrauding the grantor's creditors; that it was the agreement between the parties that no title to the land should pass by the deed; that Wells Stevens had open and notorious possession of the land at the time the deed was executed and held such possession, under claim of title, until the day of his death, and that the defendant never had any interest in the land.

We think the court did right in sustaining a demurrer to this reply. It is not good as a denial, for it is well settled that a general allegation of title is controlled by the specific facts pleaded, and that a pleading is to be judged from its general scope and tenor, and not by the fugitive denials cast into it. *Reynolds v. Copeland*, 71 Ind. 422; *Neidefer v. Chastain*, 71 Ind. 363 (36 Am. R. 198); *Western Union Tel. Co. v. Reed*, 96 Ind. 195, and authorities cited p. 198; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Louisville, etc., R. W. Co. v. Schmidt*, 106 Ind. 73, see p. 74.

It is not good because of the averment that the deed was

Brown, Administrator, v. Kenyon.

executed to defraud creditors, for it is perfectly well settled that a fraudulent conveyance is valid between the parties. *Second Nat'l Bank v. Brady*, 96 Ind. 498; *Edwards v. Haverstick*, 53 Ind. 348; *State Bank v. Davis*, 4 Ind. 653.

It is not aided by the averment of the mutual agreement between the parties, because the conveying part of a deed can not be overthrown by parol evidence. *Bever v. North*, 107 Ind. 544.

It is not made good by the general allegation of possession, because the continued possession of a grantor can not be adverse to his grantee. *Ronan v. Meyer*, 84 Ind. 390; *Record v. Ketcham*, 76 Ind. 482; *Rowe v. Beckett*, 30 Ind. 154.

At common law, where the rent was payable as an entirety, and the demise was by the owner of a life-estate, his death terminated the right to recover any rent at all, but this rule is so changed by the statute as to permit a recovery of the rent which accrued prior to the lessor's death. Taylor Landlord and Tenant, section 389; R. S. 1881, section 5223.

All that the appellant was entitled to recover was the unpaid rent which had accrued prior to the death of Wells Stevens.

Judgment affirmed.

Filed Nov. 22, 1886.

No. 12,839.

BROWN, ADMINISTRATOR, v. KENYON.

EVIDENCE.—*Self-Serving Declarations of a Decedent.—When Admissible.—*

Res Gestæ.—Self-serving declarations of a decedent, made in the absence of the other party, are not admissible in behalf of his administrator, unless they qualify and give character to some act which is material to the issue, and are thus a part of the *res gestæ* of such act.

From the Hamilton Circuit Court.

106	228
132	401
106	228
136	607
108	383
140	495
108	283
152	474

Brown, Administrator, v. Kenyon.

R. R. Stephenson, for appellant.

T. J. Kane, T. P. Davis, J. Stafford and T. E. Boyd, for appellee.

ZOLLARS, J.—Appellant, as the administrator of the estate of Oliver H. Brown, deceased, instituted this action to recover upon promissory notes, and to foreclose a mortgage securing the same, executed by appellee to the decedent.

The defence set up in the answer is, that subsequent to the execution of the notes, it was agreed between Brown, the payee, now deceased, and appellee, that he should board and furnish a home for Brown during his natural life, in full satisfaction and payment of the debt evidenced by the notes, and that appellee had kept and performed the contract on his part.

The notes and mortgage remained in the possession of the decedent until his death, and were found among his papers in his safe. Upon the trial of the cause below, appellee introduced several witnesses, who testified that in conversations which they had had with the decedent, he told them that he had agreed with appellee to give to him the notes and mortgage for furnishing him, Brown, a home during his life. In rebuttal, appellant offered to prove by certain named witnesses, then in court, that shortly before his death, and subsequent to the time of the agreement set up in the answer, the decedent stated to them, that he was holding the mortgage against appellee, and had fears that he, appellee, would cheat him out of it; that appellee's wife had not signed the mortgage, and that he had fears that on account of a prior mortgage, he would not be able to make his mortgage debt out of the land.

This offered evidence was excluded. Was it competent? That is the only question discussed by counsel, and the only question presented by the record, if, indeed, it is so presented, as that a decision of it favorable to appellant would require the reversal of the judgment.

Brown, Administrator, v. Kenyon.

The general rule is well settled, that declarations by a decedent against his interest may be introduced in evidence against the administrator, and that declarations in his own favor, made in the absence of the other party, are incompetent in behalf of the administrator. *Bristor v. Bristor*, 82 Ind. 276.

There is an exception to that general rule, which is stated in the case of *McConnell v. Hannah*, 96 Ind. 102, as follows: "But an exception thereto is that when declarations, qualifying and giving character to an act proper to be given in evidence, accompany that act, they are admissible whether self-serving or not, because they are a part of the *res gestæ*."

In the case of *Creighton v. Hoppis*, 99 Ind. 369, this court quoted with approval the following from the opinion in the case of *Downs v. Lyman*, 3 N. H. 486, viz.: "The rule of law is, that where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person, who did the act, proof of what the person said, at the time of doing it, is admissible in evidence, for the purpose of showing its true character."

In order that such declarations accompanying an act may be competent as a part of the *res gestæ*, manifestly, the act itself must be material to the issue involved.

When there is a question of ownership, for example, it is competent to prove possession, because possession is *prima facie* evidence of ownership, and because possession is thus material, declarations accompanying it are competent.

In the case before us, there is no question as to the ownership of the notes and mortgage, while Brown, the payee, was alive. He was the owner, and entitled to the possession of them. That was in no way called in question by appellee. The only question for trial was, as to whether or not the agreement set up in the answer was entered into between the parties, and if so, whether or not appellee had performed his part of that agreement. If there was such an agreement, and appellee had performed his part of it, the notes were paid. It

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was a question of payment. The manner of payment was such, that it could not be completed until the death of Brown, and until then appellee was not entitled to the possession of the notes and mortgage. The possession by Brown was not an act material to the issue tendered by appellee's answer. Nor would the declarations, which appellant proposed to prove, in any proper sense, qualify or give character to the act of possession by Brown.

Those declarations would tend to overthrow the case as made by appellee's answer and his witnesses, but as they did not accompany an act material to the issue to be tried, they were not a part of the *res gestæ*, and hence not competent. They were purely declarations of a party in his own favor in the absence of the other party, and hence fall within the general rule which excludes such evidence. In our judgment no error was committed in the exclusion of the proffered testimony. It is well enough to say in passing, that the record does not affirmatively show that the declarations which appellant offered to prove by the witnesses named, were not proved by other witnesses.

Judgment affirmed, at appellant's costs.

Filed Nov. 23, 1886.

108	286
126	447
127	68
108	286
130	349
108	286
136	470
108	286
147	271
108	286
160	828

 No. 12,711.

BRADBURY ET AL. v. GOODWIN.

MASTER AND SERVANT.—Negligence.—Defective Appliances.—Injury of Servant.—Liability of Master.—An employer who takes personal supervision of work, and provides defective or insufficient structures or appliances to be used in its accomplishment, is liable to an employee who, without fault on his part, sustains an injury by reason of the defective instrumentalities.

SAME.—Right of Servant to Rely on Safety of Appliances.—One employed in a hazardous undertaking, over which the employer exercises personal

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supervision, has the right to rely on the safety and sufficiency of the instrumentalities provided for the accomplishment of the work, unless their defectiveness is so glaring as to be open to the observation of prudent men.

SAME.—The defendant, desiring to move a heavy iron safe from his office in the second story of a building to another building, constructed an anchorage of framework at the head of the stairway leading to the street, to which ropes and pulleys were attached, to control the descent of the safe. Afterwards the plaintiff was called in and directed by the defendant to take a position in front of the safe, to assist in lowering it. The frame work gave way and the plaintiff was injured.

Held, that he can recover.

From the Wayne Circuit Court.

J. F. Kibbey, J. H. Kibbey, T. J. Study and H. U. Johnson, for appellants.

A. L. Study, H. C. Fox and L. C. Abbott, for appellee.

MITCHELL, J.—The following are the material facts as they appear in the complaint in this case : On the 23d day of July, 1884, William H. and Wilbern K. Bradbury were engaged in the real estate and insurance business, under the firm name of Wm. H. Bradbury & Son. They occupied an office in the second story of a building adjoining the Second National Bank building, situate on Main street, in the city of Richmond.

Being about to change their business location, they employed the plaintiff, George W. Goodwin, to assist in removing their heavy iron safe from the room theretofore occupied to another, into which they proposed to move their office, furniture and business. Preparatory to the removal of the safe, the defendants constructed an anchorage of framework, at the head of the stairway leading from the second story of the building out of which they proposed to move, out on to Main street. To the framework so constructed, ropes and pulleys were attached, by means of which it was intended to control the descent of the safe from the head of the stairway to the foot thereof, and to the sidewalk below.

At the time Goodwin was employed to assist, the frame-

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work had been constructed, the safe had been moved out of the office to the landing at the head of the stairway, and the ropes and pulleys had been adjusted to the safe.

The plaintiff alleges that the defendants then directed him and another employee to take their places in front of the safe, and assist in moving it down the stairway on a wooden track or tramway, which had been prepared for the purpose, and that being assured that the framework and appliances so prepared were safe and sufficient, and relying on such assurances, he entered upon the work, in front of the safe as directed. It is charged that the framework and appliances were so negligently and unskillfully constructed and arranged, as that when the weight of the iron safe came upon it the framework broke and gave way, and precipitated the safe down the stairway upon the plaintiff, who, without any fault, sustained grievous bodily injury, necessitating the amputation of one of his legs, midway between the ankle and knee.

The sufficiency of this complaint was challenged by a demurrer, which was overruled.

The facts put forward in the complaint bring the case fully within the rule which holds a master guilty of negligence, who takes the personal supervision of work, and provides, or causes to be provided, defective or insufficient structures or appliances, which are to be used in the accomplishment of the work proposed. The cases uniformly affirm the doctrine that a servant, who, without fault, sustains an injury in the use of means and instrumentalities so provided, may look to the master for redress.

Where one employs others to work under his direction, giving those employed no charge or responsibility in regard to the appliances to be used, or the result to be accomplished, the responsibility for both remain with the employer.

Having assumed the supervision of a hazardous undertaking, in the performance of which he has employed or invited others to assist, those employed have the right to rely on the safety and sufficiency of the instrumentalities provided, un-

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less their defectiveness is so glaring as to be open to the observation of prudent men.

For example, when one undertakes to build a staging, or to have it built under his direct personal supervision, he is liable for an injury resulting from any defect or insufficiency in the structure, which might have been avoided and made good by the exercise of due care. In such a case, it is not enough that suitable material has been provided. It is necessary that proper skill and judgment should have been employed in the use thereof. If these were not possessed by the employer, it was his own folly to assume the supervision of the work. *Manning v. Hogan*, 78 N. Y. 615; *Arkerson v. Dennison*, 117 Mass. 407; *Peschel v. Chicago, etc., R. W. Co.*, 62 Wis. 338; *Behm v. Armour*, 58 Wis. 1.

It may well be that if an employer directs that certain work be done, leaving it to the workmen to provide the structures and appliances required for its prosecution, his responsibility to those employed ends with the selection of suitable men and material for the work.

Such a case is not presented by the complaint. The appellants themselves supervised the preparation of the framework and appliances which were designed to control the descent of the ponderous safe down the stairway to the sidewalk. Having done this, they directed the appellee to place himself in a position of extreme peril, after giving him assurance that the means provided for sustaining the weight of the safe were sufficient.

Without any express assurance, the legal implication was, when the appellants directed their employee to place himself in a situation in which his life and limbs depended upon the sufficiency of the instrumentalities, the construction of which they personally supervised, that they adopted such precautions in providing appliances as rendered his position safe.

If the appellee had assisted in the preparation of the framework, and had become possessed of as much knowledge con-

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cerning the material, and the defectiveness of the appliances and arrangements, as the appellants themselves had or assumed to have, a different question would have been presented.

The rule is settled that if a servant is fully aware of the hazards of the employment, as the business is conducted, and has equal opportunities for knowing, and equal knowledge with the master, concerning defective appliances for doing the work, and with such opportunities or knowledge proceeds in the business, he assumes the risk of the service. *Umbach v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191, and cases cited; *Lake Shore, etc., R. W. Co. v. Stupak, ante*, p. 1.

But if there are defective appliances for which the master is responsible, which are unknown to the servant, or with which he had not sufficient opportunity to become acquainted, if the latter is injured thereby, and is free from negligence, the master is liable.

The complaint presents a case in which the appellants assumed the obligation of furnishing means and appliances, safe and adequate to the purpose for which they were designed. Since it does not appear that the appliances were glaringly or palpably inadequate, the appellee was not chargeable with knowledge or responsibility as to their character or suitability. He was, therefore, justified in supposing that such skill, prudence and foresight had been employed in their preparation as rendered them safe. *Indiana Car Co. v. Parker*, 100 Ind. 181; 2 Thompson Neg., p. 975.

The demurrer to the complaint was properly overruled.

Upon an issue made by the general denial, a trial was had by a jury, which resulted in a verdict and judgment for the plaintiff below for \$1,200. It is now contended that the verdict is not sustained by the evidence.

Without rehearsing the evidence, it is sufficient to say, if the testimony given in behalf of the plaintiff was believed by the jury, it sustains all the material averments in the complaint. It appeared that all the preparatory arrangements

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for lowering the safe had been made by, or under the direct supervision of, the appellants.

A Mr. Bennett, who assisted in making these arrangements, sent a colored boy, with a request to the appellee to come and assist in lowering the safe. The appellee was a laborer, who had before assisted in moving safes, but was without special experience as an expert in the business. The appellants were informed by Bennett of what he had done, and expressed no dissent. The appellee testified that when he appeared on the scene, in answer to the request, the safe stood at the head of the stairway, and the arrangements for lowering it had all been completed. He was directed by one of the appellants to take a position in front of the safe, and assist in regulating the blocks on the tramway upon which the safe was to be lowered. He inquired whether everything was safe, and was assured that it was. Soon after the process of lowering began, the framework to which the ropes and pulleys were attached gave way, with the result that the safe was precipitated upon the appellee, inflicting upon him a painful and permanent injury.

There was affirmative evidence tending to prove that both the materials used in the construction of the framework, and the manner of its construction, were defective and insufficient. Indeed, the mere fact that it broke down almost the instant the weight of the safe came upon it, raised a strong presumption of its insufficiency.

The appellants denied that Goodwin had been employed with their consent, or that they had given him any assurance in regard to the safety of the appliances, or that they directed him in any manner whatever.

The jury, however, found against them—as well they might—upon the evidence. We find no reason to disturb their finding.

The appellants complain of the giving of instruction No. 10, which is set out in the record. The instruction can not with propriety be set out, on account of its length. It is suf-

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ficient to say that this instruction, with others given, contained a precise and accurate exposition of the law of the case, in harmony with the principles already announced in this opinion. There was no error.

The judgment is affirmed, with costs.

Filed Nov. 22, 1886.

108	292
126	187
108	292
130	407
108	292
134	508
108	292
142	339
108	292
146	403
108	292
154	578
156	574

 No. 12,474.

MCCULLOUGH ET AL. v. DAVIS ET AL.

MORTGAGE.—*Married Woman.*—*Land Held in Virtue of Previous Marriage.*—*Mortgage During Second Coverture Void.*—*Descent.*—*Sheriff's Sale.*—Under section 2484, R. S. 1881, a mortgage executed by a woman and her second husband upon land which descended to her as the widow of her first husband, who left children surviving him, is void and creates no lien upon such land, and a purchaser under foreclosure proceedings takes no title.

EVIDENCE.—*Objection to Admission of Must be Specific.*—An objection to the admission of evidence, that it is "irrelevant, incompetent and immaterial," is too indefinite and uncertain to present any question on appeal.

SAME.—*Destroyed Records.*—*Latitude Allowable in Admission of Parol Evidence.*—Much latitude is allowable in the admission of parol evidence to supply what has been lost by the destruction of papers and records.

From the Madison Circuit Court.

M. S. Robinson and J. W. Lovett, for appellants.

M. A. Chipman, J. W. Sansberry, Jr., and F. A. Walker, for appellees.

NIBLACK, J.—Action by Neal C. McCullough and three others, constituting the firm of Neal C. McCullough & Co., against Ann Davis and William P. Davis, to recover the possession of twenty acres of land in Madison county.

The defendants answered: *First.* In general denial. *Secondly.* That in June, 1859, one Oscar F. Eads died seized of the lands described in the complaint, and other lands in Mad-

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ison county, leaving the defendant, Ann Davis, as his widow, and also children of the marriage, who still survive him, as his heirs at law; that afterwards the said Ann intermarried with her co-defendant, William P. Davis, and has ever since continued to be his wife; that after her said intermarriage, that is to say, in the year 1875, by proper proceedings in partition in the Madison Circuit Court, between the said Ann Davis and her husband, and the children and heirs at law of the said Oscar F. Eads, deceased, the lands in controversy were assigned and set off to the said Ann Davis as her one-third part of the lands of which the said Oscar F. Eads died seized; that she, the said Ann, thereupon entered upon and took possession of said lands; that afterwards, on the 9th day of April, 1875, the defendants, Ann Davis and William P. Davis, as her husband, executed a mortgage on the lands in question to one Matilda E. Davis; that thereafter said mortgage was, by a decree of the Madison Circuit Court, foreclosed, and the said Neal C. McCullough, one of the plaintiffs herein, became the purchaser of such lands at a sheriff's sale upon such decree; that through the said McCullough said lands were afterwards conveyed to the plaintiff; that such conveyance, so based upon the sheriff's sale, constituted the only claim of title which the plaintiffs had to the lands in suit.

A demurrer to this second paragraph of answer being first overruled, the plaintiffs replied in denial, and a trial by the court resulted in a finding and judgment for the defendants.

Questions are only made here upon the overruling of the demurrer to the second paragraph of the answer, and upon the refusal of the circuit court to grant a new trial as requested by the plaintiffs.

In support of the alleged insufficiency of the second paragraph of the answer, it is claimed that a purchaser of real estate at sheriff's sale acquires all the interest, whatever that may have been, which the judgment defendant had in the same at the time of the sale, and that consequently, upon the facts

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set up in that paragraph of answer, the plaintiff had succeeded to all the estate theretofore held by Ann Davis in the real estate embraced in the sheriff's deed, and had thereby become at least entitled to the possession, use and occupation of such real estate during the natural life of the said Ann Davis, citing the case of *Miller v. Noble*, 86 Ind. 527, as fully sustaining the position thus assumed. But we do not place the construction contended for upon the case so cited. That case simply and only decided that the children of John A. Noble, deceased, took the real estate in litigation to the exclusion of a purchaser at sheriff's sale upon a judgment rendered against the widow after she had married a second time. All that was said in the cause which seemingly sustains the doctrine contended for was said argumentatively as applicable more to positions assumed by counsel than to any question really presented by the record.

The recent case of *Ætna Life Ins. Co. v. Buck*, *ante*, p. 174, does not support the construction of section 2484, R. S. 1881, which it is insisted the case of *Miller v. Noble*, *supra*, places upon it. It, on the contrary, holds that a mortgage executed by a woman and her second husband upon lands which descended to her as the widow of her first husband, who left children still surviving him, creates no lien upon such lands, and is, consequently, void.

In the respect stated, this last case puts the same construction upon section 2484, above named, which had been previously given to section 18 of the statute of descents enacted in 1852. *Schlemmer v. Rossler*, 59 Ind. 326; *Smith v. Beard*, 73 Ind. 159.

The demurrer to the second paragraph of the answer was, therefore, correctly overruled.

As preliminary to the introduction of evidence in this cause, it was agreed that all the papers and records of the common pleas court of Madison county, and of the Madison Circuit Court, were destroyed by fire on the 10th day of December, 1880. Nevertheless a certified copy of a decree of partition

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between the widow and children of Oscar F. Eads, deceased, entered by the Madison Circuit Court early in the spring of 1875, and purporting to assign and set off to Ann Davis the twenty-acre tract of land in contest, in severalty and in fee simple, was read in evidence.

There was evidence tending to show that, at the trial which preceded this decree of partition, Ann Davis set up the claim that all the lands then sought to be divided equitably belonged to her, and that the said Oscar F. Eads, at the time of his death, held the same only in trust for her, and from that it is argued that she has ever since been estopped from asserting any other claim of title to the land assigned and set off to her by the partition proceedings.

Owing, however, to the destruction by fire of the record and original papers in the partition suit, proof of the issues which were formed, and of what occurred at the trial, rested very largely upon parol testimony, and as to those matters the parol testimony introduced was vague, uncertain and unsatisfactory. In determining what did occur at that trial, the court below evidently had to rely upon circumstances brought to its attention and upon inferential facts. There was also evidence, and what was apparently a strong preponderance of evidence, tending to show that the only claim of title which Ann Davis at any time had, and the only claim really asserted by her, to the land in dispute, was as the widow of Oscar F. Eads, her first husband.

To our minds, the inference from the facts and circumstances proven appears to have been reasonable, that the decree of partition was based upon a finding that the only title which the parties had to the lands, which the decree caused to be partitioned, was such as they derived by descent from Oscar F. Eads, deceased, as his widow and children, and that partition was ordered and made upon that theory and upon that theory alone. We are, consequently, unable to discover any reason for holding that the finding of the court below was not well supported by the evidence.

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While Ann Davis was testifying as a witness in her own behalf, she was asked whether or not the court in the partition suit found and adjudged that she was entitled to one-third of the sixty acres of land described in the complaint, as the widow of Oscar F. Eads, deceased, and, over the objection that the question was irrelevant, incompetent and immaterial, she was permitted to answer in the affirmative. Upon the authority of *Forbing v. Weber*, 99 Ind. 588, the objection thus made to the question proposed was too indefinite and uncertain to present any question in this court.

Mrs. Davis was also, over a similar objection, permitted to state that her first husband, Oscar F. Eads, was, at the time of his death, in possession of the lands sought to be recovered by the plaintiffs, together with other real estate.

For the reasons lastly above given, no question is presented here upon that ruling. Besides, the fact to which Mrs. Davis thus testified, was a matter which might in any event have been proved by parol, and no apparent injury was inflicted by permitting her to so testify as to such fact. Mrs. Davis was, over objection, allowed to answer other questions, of which complaint is made, but in each case, so far as we have observed, the objection was too general to raise any question here.

Howell D. Thompson, one of the attorneys for Ann Davis in the partition suit, was permitted to make statements as a witness as to the title upon which partition was demanded, and as to the finding of the court as to the nature of Mrs. Davis' interest in the lands involved in that suit, and questions were reserved upon those statements.

It must be borne in mind that much latitude is allowable in the admission of parol evidence to supply what has been lost by the destruction of papers and records. It may be that this indulgent latitude was carried to its ultimate, if not an extreme, limit in the examination of Mr. Thompson; but, however that may have been, we regard the finding below as having been substantially right upon the evidence,

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and hence have no reason to infer that the plaintiffs were materially injured by any of the statements made as above by Mr. Thompson.

The judgment is affirmed, with costs.

Filed Nov. 22, 1886.

No. 12,535.

SIMMONS v. LINDLEY ET AL.

REAL ESTATE.—*Action to Recover.—Right to Possession When Suit Brought.—*

Complaint.—Supplemental Complaint.—In an action to recover real estate, a complaint, which fails to allege that the plaintiff was entitled to the possession at the time he commenced his suit, is insufficient on demurrer, and such defect is not cured by the filing of a supplemental complaint by the plaintiff's heirs, after his death, alleging that they are entitled to the immediate possession of such real estate.

PLEADING.—*Supplemental Complaint.—Amended Complaint.—Practice.*—The office of a supplemental complaint is to show facts which have occurred since the filing of the original complaint. If the original complaint is bad, and at the time it was filed facts existed which, if properly pleaded, would have made it sufficient on demurrer, such facts must be brought into the case by an amended complaint, and not by supplemental complaint.

From the Hancock Circuit Court.

W. R. Hough, for appellant.

W. S. Denton, E. Marsh and W. W. Cook, for appellees.

Howk, J.—The first error complained of here by appellant, the defendant below, is the overruling of his demurrer to appellees' complaint herein.

This suit was commenced in the court below on the 30th day of May, 1884, by one Martha A. Woods as sole plaintiff, against the appellant as sole defendant. In her complaint then filed, Martha A. Woods alleged that she was the owner in fee simple of the undivided one-third of certain parcels of

108	297
140	123
142	219
108	297
144	209
108	297
149	440
149	441

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real estate, particularly described, in Hancock county; and that appellant wrongfully, and without any lawful right, detained and kept possession thereof from her, and denied her title thereto. Wherefore she demanded judgment for the possession of said property, and for all other proper relief.

Afterwards, on the 30th day of December, 1884, and before any steps had been taken in the cause, the death of Martha A. Woods was suggested to the court. Thereafter, on the 9th day of June, 1885, the appellees appeared as plaintiffs and filed what is called their supplemental complaint herein, and alleged therein that, since the commencement of this suit, the original plaintiff, Martha A. Woods, had died testate, leaving as her surviving children and devisees the appellee, Olive F., wife of William F. Lindley, Sarah A., wife of Clarence A. Burk, and John C. Woods, to whom she devised all said parcels of real estate; that they were the owners in fee simple of the real estate, described in the original complaint, which they also described particularly in their supplemental complaint; that the appellant unlawfully and without right detained and kept the possession of said real estate from the appellees, and wholly denied their title thereto; and the appellees averred that they were entitled to the immediate possession of said real estate. Wherefore they demanded judgment for the possession of said real estate, and for all other proper relief.

After this supplemental complaint was filed, appellant demurred to the original complaint of Martha A. Woods. This was the only demurrer filed by appellant, so far as the record shows, and it was overruled by the court. It must be this ruling which appellant assigned here as his first error, because the record fails to show either that he demurred to the complaint of the appellees, or that such a demurrer was overruled by the court.

In argument, appellant's counsel vigorously insists that the original complaint of Martha A. Woods was bad, and that it was error to overrule his demurrer thereto. That

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much must be conceded, we think. The original complaint sought to recover the possession of real estate, and it contained no averment of the fact, if it were the fact, that Martha A. Woods, the plaintiff therein, was entitled to the possession of the real estate, at the time she commenced her suit. For the want of such an averment, it is clear that the original complaint herein did not state facts sufficient to constitute a cause of action, and that the demurrer thereto ought to have been sustained. Section 1054, R. S. 1881; *McCarnan v. Cochran*, 57 Ind. 166; *Vance v. Schroyer*, 77 Ind. 501; *Second Nat'l Bank, etc., v. Corey*, 94 Ind. 457.

But can this error of the court, for such it was, be made available by the appellant for the reversal of the judgment below? As we have seen, after the death of the original plaintiff, Martha A. Woods, the appellees, as her heirs and devisees, appeared and filed what they called "a supplemental complaint herein." We have said that the appellant had failed to challenge the sufficiency of this so-called supplemental complaint, by a demurrer thereto for the want of facts; but the reason for this failure may have been that, in *Derry v. Derry*, 98 Ind. 319, it was held by this court that a demurrer to a supplemental complaint is unwarranted, and presents no question. In section 399, R. S. 1881, which is a literal re-enactment of section 102 of the civil code of 1852, provision is made for filing "supplemental pleadings, showing facts which occurred after the former pleadings were filed."

In *Musselman v. Manly*, 42 Ind. 462, after quoting such section 102 of the civil code of 1852, then in force, the court said: "A supplemental complaint is not, like an amended complaint, a substitute for the original complaint, by which the former complaint is superseded; but it is a further complaint and assumes that the original complaint is to stand."

A supplemental complaint must show facts which occurred after the filing of the original complaint. If the original complaint is bad, and, at the time it was filed, there were

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facts then existing which, if they had been properly pleaded, would have made such complaint sufficient to withstand a demurrer for the want of facts, it is settled by our decisions that such existing facts can only be brought into the case by an amended complaint, and never by a supplemental complaint. *Patten v. Stewart*, 24 Ind. 332; *Musselman v. Manly*, *supra*; *Morey v. Ball*, 90 Ind. 450; *Dillman v. Dillman*, 90 Ind. 585; *Davis v. Krug*, 95 Ind. 1; *Derry v. Derry*, *supra*.

In the case under consideration, the appellees did not attempt to supply the material omitted averment in the original complaint, by their supplemental complaint. It is true they alleged, that they were entitled to the possession of the real estate in controversy; but it does not follow from this averment, by any means, that the original plaintiff, Martha A. Woods, was shown to have been, or was in fact, entitled to the possession of such real estate, at the time she commenced this suit. We are constrained, therefore, to hold that the error of the trial court, in overruling appellant's demurrer to the original complaint, is fatal to the appellees' case as they have presented it, and, for that reason, is available to the appellant for the reversal of the judgment below.

This conclusion renders it unnecessary and, perhaps, improper for us to consider now the only other error, of which appellant complains.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed Nov. 22, 1886.

Ward *et al.* v. The Berkshire Life Insurance Company.

No. 13,164.

WARD ET AL. v. THE BERKSHIRE LIFE INSURANCE COMPANY.

MARRIED WOMAN.—*Estoppel.*—Under the law of this State, a married woman is bound by an estoppel in *pais* like any other person, and this extends to the conveyance of land, either by deed or mortgage.

SAME.—*Mortgage.*—*Representation that Loan is for Her Use.*—*When Binding.*—*Suretyship.*—A married woman who makes a representation by affidavit, which is in good faith relied on and believed to be true, that a loan is for her own use and benefit, is estopped, in a suit to foreclose a mortgage executed upon her lands to secure the loan, to deny the truth of such representation, by asserting that the mortgage was given as a security for the debt of her husband.

SAME.—*Fraud.*—There can be no estoppel where there is no fraud, but there may be fraud although there was no preconceived design to mislead or deceive. It may consist in the denial of what has been previously affirmed.

SAME.—*Check for Amount of Loan.*—*Payee Immaterial.*—It is immaterial to whom the check for money loaned was made payable, for if the loan was made to the wife the mortgage is valid.

SPECIAL FINDING.—*Clerical Error.*—A harmless clerical error in the special finding of facts is not available for a reversal of the judgment.

From the Marion Superior Court.

T. Hanna and *S. A. Hays*, for appellants.

J. M. Judah and *O. B. Jameson*, for appellee.

ELLIOTT, C. J.—The complaint of the appellee is founded on a mortgage executed since the married woman's act of 1881 went into force. It is averred that the mortgage was executed to secure a loan made to Mary A. Ward for her own benefit. The second and third paragraphs of Mrs. Ward's answer alleged coverture, that the property belonged to her, and that she was the surety of her husband. The fourth pleaded suretyship and coverture, and averred that Mrs. Ward received no consideration for the mortgage. The fifth is substantially the same as the second and third, the only difference being that it sets out the facts in detail, and really pleads the evidence.

108	301
124	598
126	643
108	301
128	22
108	301
131	271
131	541
108	301
134	35
134	481
108	301
138	218
108	301
142	503
108	301
154	361
108	301
160	532
108	301
162	634
108	301
164	396

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The second paragraph of the appellee's reply alleges, in substance, that Mrs. Ward, knowing the purpose for which the loan was asked and offered, and for the purpose of inducing the appellee to make the loan and to pay three thousand dollars thereon, represented that she was borrowing the money for her own use, and not as surety for any one, and made an affidavit to the truth of such representations; that the appellee neither knew, nor had the means of knowing, that the representations were not true, but in good faith relied thereon and made the loan, which it would not have done had not such representations been made. A demurrer was overruled to this reply, and we are called upon to determine whether it was or was not sufficient.

It is argued with much ability and ingenuity, that the question is one of power, and that the legal incapacity of coverture can not be removed by fraudulent representations. In support of this contention we are referred, among other authorities, to the cases of *Steadman v. Duhamel*, 1 C. B. 888, and *Levering v. Shockey*, 100 Ind. 558.

This argument is plausible but unsound. The assumption which constitutes its foundation can not be made good. The question is not one of power or capacity, but the question is one of fact, for, if the contract was one of suretyship, Mrs. Ward had no power to enter into it, but if it was not, then she had capacity to execute it. There is no doubt that, under our present law, a married woman has the general capacity to enter into contracts. The only exceptions are those specified in the statute, and the chief of these is, that she may not enter into contracts of suretyship. *Arnold v. Engleman*, 103 Ind. 512; *Rosa v. Prather*, 103 Ind. 191; *Vogel v. Leichner*, 102 Ind. 55; *Rothschild v. Raab*, 93 Ind. 488; *Wulschner v. Sells*, 87 Ind. 71.

The decision hinges upon the fact that the contract was not one of suretyship, but was a contract to obtain money for the wife's benefit. While it may possibly be true that a representation by the wife that she was not under coverture

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would not bind her, still, it would by no means follow that her representation that the contract was not one of suretyship would not estop her, for, in representing the character of the contract, she does not represent that she is not under the disability of coverture. It is one thing to make a representation respecting the capacity to contract, and quite another to represent that the contract is of a given character. If a married woman should seek credit by representing that goods were for her personal use, and thus obtain credit from a merchant, we suppose no one would contend that such a representation was as to her capacity to contract, and the real case before us is not different in any legal aspect from such a case, although there is a difference as to the facts. It is very clear to our minds that a representation that money sought as a loan is for the use and benefit of the wife, is not a representation that the wife has capacity to contract, for it is not in any sense a denial of the existence of the disability of coverture, but is merely an affirmation of the fact that the contract into which she proposes to enter is a contract for her own benefit.

Our statute and our decisions declare that a married woman may be bound "by an estoppel like any other person." It may be doubtful whether this rule would not require it to be held that she might bind herself by a representation as to her capacity to contract, but, however this may be, it is quite clear that, under this rule, she is bound by a representation as to the character of the contract into which she seeks to enter, and from which she asserts she will receive a benefit.

In discussing this question it was said in *Vogel v. Leichner*, *supra*, that "She is to be estopped as any other person, by causing the lender to believe that a state of facts exists which does not, or that the transaction is one thing, while in fact it is another." This doctrine is fully maintained in the cases of *Cupp v. Campbell*, 103 Ind. 213, and *Orr v. White*, 106 Ind. 341. In the case last cited, it was said: "She may now be bound by an estoppel *in pais*, like any other person. Such an estoppel

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can only be predicated upon a wrong. It can not exist if the person dealing with her either knew the facts or was ignorant from a failure to enquire, unless he was misled by the misrepresentations of the wife."

It would nullify our statute, and render meaningless our decisions, to hold that a married woman can not estop herself by a representation as to the character of the contract into which she invites another to enter, and upon the faith of which the person with whom she contracts has parted with money or some other thing of value, and this is a result which it is our duty to avert.

It is true that there can be no estoppel where there is no fraud, but there may be fraud although there was no preconceived design to mislead or deceive. The fraud consists in the denial of what was previously affirmed. *Anderson v. Hubble*, 93 Ind. 570 (47 Am. R. 394); *Pitcher v. Dove*, 99 Ind. 175; *Continental Nat'l Bank v. National Bank*, 50 N. Y. 575; *Blair v. Wait*, 69 N. Y. 113.

In this instance, Mrs. Ward, having solemnly sworn that the loan which she asked was for her own use and benefit, can not, without a grave wrong, affirm that what she thus represented was not true. It would violate all principles of justice to permit her to deny what she had asserted, and by so doing entail loss upon one who in good faith relied upon her representations, and made the loan she asked.

Tested by the principles which we have stated, the reply was unquestionably good.

The special finding states, among others, these facts: That Mrs. Ward and her husband agreed that her property should be mortgaged to secure \$3,000 for the use of the husband in the business in which he was then engaged, and that the purpose of obtaining the loan was to furnish the husband with that sum of money; that the husband made application for the loan in writing, giving the names of the borrowers as Mary and Patrick Ward, but signing his own name to the application; that at the time this application was presented

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Patrick Ward represented that the money was desired by his wife for her separate use, and on being informed by the appellee's agent that if the mortgage was to secure the debt of any one else than his wife the mortgage would be void, he stated that he and his wife would make oath that the mortgage was not made to secure the debt or liability of Patrick Ward or any other person; the husband and wife did make and present to the appellee's agent an affidavit that the mortgage was not executed as a security for the debt or liability of Patrick Ward or any other person; that appellee had no knowledge whatever that the purpose of the loan was to obtain money for Patrick Ward or any other person than Mary Ward; that the agent had no other means of obtaining knowledge of the purpose for which the loan was sought, nor of the use to which the proceeds of the loan were applied, except the statements of Mr. and Mrs. Ward; that the agent relied on such statements and believed that the loan was for the use and benefit of Mrs. Ward, and that the mortgage was not executed as a security for the debt or liability of the husband or any other person. To the conclusions of law stated on the findings the appellant reserved exceptions.

Much that has been said in discussing the sufficiency of the reply applies to the questions presented by the special finding, and we shall not again travel over the ground embraced in that discussion, but shall confine our attention to such phases of the legal question as have not been considered.

It is contended that as between husband and wife, the contract was one of suretyship, and that, as this was the actual contract, the mortgage was void, because it does not appear that the appellee was ignorant of the contract between Mr. and Mrs. Ward. This argument rests on a mistaken view of the facts stated in the special finding, for it is there stated in strong and clear terms, that the appellee believed that the money was for the use of Mrs. Ward, and it is also stated

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that if the appellee's agent "had not placed full reliance on the truth of the statements" of Mr. and Mrs. Ward, "the loan would not have been made," and that the appellee "had no knowledge whatever that the purpose was to obtain money for the said Patrick Ward."

It is asserted that the estoppel for which the statute provides does not extend to the conveyance of lands, either by deed or mortgage. But we can find no words in the statute which warrants this assumption; on the contrary, the language employed in the statute is very broad, for the provision is that "she shall be bound by an estoppel *in pais* like any other person."

The decisions to which we have already referred apply this statutory provision to such cases as the present, and it is impossible not to so apply it without completely overthrowing all rules of construction. Here there is a conveyance in which the husband has joined, and unless it was made for a purpose prohibited by statute, it is valid, otherwise invalid; so that the sole question is this, is the wife estopped from asserting that the conveyance was made for the purpose interdicted by statute? If conduct can in any case estop a married woman, it surely must do so in this case, and we hold that by her conduct she is concluded from asserting that the mortgage was executed as a security for the debt of her husband.

It is not material that there was a secret agreement between the husband and wife, for the appellee could not be prejudiced by an agreement of which it had no notice. The question is, not what facts were known to the mortgagors, but what facts did the appellee have knowledge of, or ought it under the circumstances to be charged with having knowledge of? It is true that the appellee, having notice of Mrs. Ward's coverture, was bound to inquire whether she had capacity to make the contract; but when reasonable care and diligence are exercised, the party contracting with the married woman may rely upon her representations. *Cupp v. Campbell, supra.* Here

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reasonable care and diligence were exercised, for no other person than the married woman could so well inform the lender what she intended to do with the money obtained upon the mortgage, and there were no circumstances indicating that her representations were untrue, or even subjecting them to suspicion.

It is the general rule that a creditor is not prejudiced by an agreement between his debtors, constituting one of them a surety, unless he has knowledge of the agreement. *McCloskey v. Indianapolis, etc., Union*, 67 Ind. 86 (33 Am. R. 76); *Gipson v. Ogden*, 100 Ind. 20, and cases cited.

This general rule can not, in its full force, be applied to contracts made with a married woman by one who has knowledge of her coverture; but it does apply in so far as to protect him where, after reasonable care and diligence, he has ascertained that the contract is one which she may execute.

Counsel couple together the motion for a new trial and the motion for a *venire de novo*, and discuss several questions, assuming that they are presented by one or both of the motions. We shall adopt the method of counsel and consider the questions without enquiring into the propriety of the method in which they are presented.

It is complained that one of the paragraphs of the findings of the court is insufficient because it asserts that the court is unable to determine to whom the check given for the proceeds of the loan was made payable. This was utterly immaterial, and it was not necessary to make any statement at all upon that subject. No matter to whom the check was made payable, if the loan was made to the wife, the mortgage is valid. The manner in which the check was drawn might have furnished some evidence as to the person to whom the loan was actually made, but it was not an inferential fact entitled to a place in the special finding. Like surplusage in pleadings, such an immaterial finding does not vitiate.

It is perhaps true, that in one of the paragraphs of the

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special finding, the court made a mistake in giving the date of the note and mortgage, but other portions of the finding clearly show that this was a mere clerical error. At all events it was not, as the whole record plainly shows, an error that prejudiced the substantial rights of the appellants, and it is only substantial errors that entitle parties to a reversal.

Questions as to the sufficiency of the evidence to sustain the special finding are made and argued, but we need do no more than say that there is evidence sustaining these findings upon all material points, and refer to the rule that in such cases this court will not disturb the finding.

Judgment affirmed.

Filed Nov. 23, 1886.

108	308
126	134
108	308
149	301
108	308
156	536

No. 12,832.

THE WESTERN UNION TELEGRAPH COMPANY v. WILSON.

TELEGRAPH COMPANY.—*Refusal to Transmit Message Over Indirect Line When Direct Line is Available.*—*Penalty.*—A telegraph company is not liable for the penalty provided in section 4176, R. S. 1881, for refusing to receive a message for transmission from one office to the desired destination, over an indirect line necessitating repetition, where it has another office in the same town, and only a short distance from the first, from which the message can be sent directly to its destination, without repetition, and from which it subsequently is sent without delay, and promptly delivered.

From the Monroe Circuit Court.

J. H. Loudon and R. W. Miers, for appellant.

J. W. Buskirk and H. C. Duncan, for appellee.

ZOLLARS, J.—The evidence establishes the following facts: In December, 1884, appellant, the Western Union Telegraph Company, had two offices in the town of Gosport in this State, situated about eighty yards apart, one on the Indianapolis

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and Vincennes Railroad, called the upper office, and one on the Louisville, New Albany and Chicago Railroad, called the lower office. It had a line of wire along the line of each of said railroads. That along the line of the Louisville, New Albany and Chicago Railroad led direct from Gosport to Bedford, in this State. Over that line a message could be sent direct from Gosport to Bedford, without being repeated. The wire along the line of the Indianapolis and Vincennes Railroad led to Indianapolis. In order to get a message over that line from Gosport to Bedford, it would have been necessary to send it to Indianapolis, and there repeat it to Lafayette, New Albany, Greencastle or Crawfordsville, and there again repeat it to Bedford.

At about 5 o'clock P. M. of the 22d day of December, 1884, appellee went to the upper office in Gosport, being that on the line of the Indianapolis and Vincennes Railroad, and wrote and presented to appellant's agent a message addressed to Capt. Friedley, at Bedford. The agent told him that the charge for transmitting the message would be thirty cents; that he would not transmit it from that office, and that he, appellee, would have to send it from the other office, being the lower office, on the line of the Louisville, New Albany and Chicago Railroad; that it would go direct from that office. Upon appellee saying that he was in a hurry, the agent told him that he could get a boy to take the message to the other office, and upon appellee saying that he would not do so, the agent told him that he would take it for him. At that time the message, and a half dollar of appellee's money, out of which he requested the thirty cents to be taken, were upon the counter. After the agent had declined to send the message from that office, and after the above conversation, appellee took the message and money from the counter, saying that he would sue the company, went to the other office, submitted the message, and paid the thirty cents, and at fifteen minutes after 5 o'clock P. M. of the same day, the message

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had been transmitted and delivered to Capt. Friedley at Bedford.

There is no conflict in the evidence as to the above stated facts. The agent at the upper office testified that at the time he instructed appellee to go to the other office, he explained to him that if sent from the upper office the message would have to be forwarded to Indianapolis, and there be repeated to Lafayette or New Albany, and then again be repeated to Bedford.

That testimony was contradicted by appellee only indirectly, if, indeed, it was contradicted at all.

Upon the foregoing evidence, the court below found for appellee, and awarded him the statutory penalty of one hundred dollars.

It will be observed, that the wrong on appellant's part, if there was any wrong as claimed by appellee, occurred in December, 1884, before the passage of the act of 1885, Acts 1885, p. 151. It has been held that that act repealed section 4176, R. S. 1881, upon the same subject, but that such repeal did not release or extinguish any penalty incurred under that section. *Western Union Tel. Co. v. Brown*, *post*, p. 538.

If, therefore, appellant was guilty of any wrong, which, under that section, made it liable for the penalty therein provided, appellee may recover it in this action. That section was as follows: "Every electric telegraph company with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and, on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed," etc.

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That statute was a penal one, and while it must be given a reasonable construction so as to make it subserve the purpose for which it was enacted, it must yet be strictly construed. A party claiming under it must bring his case clearly within the letter and spirit of the act. *Western Union Tel. Co. v. Axtell*, 69 Ind. 199; *Western Union Tel. Co. v. Mossler*, 95 Ind. 29; *Western Union Tel. Co. v. Kinney*, 106 Ind. 468; *Western Union Tel. Co. v. Harding*, 103 Ind. 505.

In the case of *Western Union Tel. Co. v. Axtell*, *supra*, it was said: "A court can not create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it." See, also, *Burgh v. State, ex rel.*, *ante*, p. 132.

In construing statutes, the prime object is to ascertain and carry out the purpose of the Legislature in its enactment, and, while it is the duty of the court to yield to the words of the statute, still, in determining what meaning it was intended to have, it is proper to consider its spirit, the object it was intended to subserve, and the evils it was intended to remedy. Without doing violence to the language of the statute, the words used will be so construed as to bring the operation of the act within the intention of the Legislature. It is said to be an established rule, applicable to the construction of remedial statutes, that cases not within the reason, though within the letter, shall not be taken to be within the statute. *Miller v. State, ex rel.*, 106 Ind. 415; *Stout v. Board, etc.*, 107 Ind. 343; *City of Evansville v. Summers*, *ante*, p. 189; *Middleton v. Greeson*, 106 Ind. 18.

Doubtless there have been, and will hereafter be, many cases where it is important that the message shall be transmitted with impartiality and good faith, and where a failure in that regard will occasion but little pecuniary loss. The statute was intended to insure such good faith and impartiality in such, and all other cases, and hence, without regard to the amount of loss that may be suffered by those interested in the message, a penalty, by way of punishment, is imposed for

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a failure of duty on the part of the telegraph company. While the penalty is a fixed one, and in no way affected by the amount of damages that may be suffered by any one interested in the message, it is manifest that where there has been no neglect of duty, owing to such persons, and no invasion of their rights, as such duty and rights are fixed by the statute, there can be no penalty.

A telegraph company can not limit its liability for the penalty by contract, but if a case be such that, aside from such contract, those interested in the message can not maintain an action for damages, either nominal or otherwise, it must be plain that the company can not be held for the penalty. It can not be punished for a neglect of duty where it owes no duty. It can not be punished for not doing that which it is under no obligation to do. This, we think, is clearly the proper construction of the statute, and is in consonance with former rulings by this court.

In the case of *Julian v. Western Union Tel. Co.*, 98 Ind. 327, in speaking of the above section 4176 of the statute, it was said: "The statute does not make mere delay a ground for recovery, but the dispatch must be wrongfully postponed, or, in the language of the statute, 'neglected,' or postponed in bad faith, or through partiality. Here, as we have seen, there was no bad faith, no partiality, no negligence, and, therefore, there was a transmission of the message within the meaning of the law."

Upon the grounds suggested, it has been held that the telegraph company may stipulate that the claim for the penalty shall be presented within a reasonable time. *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; *Western Union Tel. Co. v. Jones*, 95 Ind. 228 (48 Am. R. 713).

And so, it has been held, that an action for the penalty can not be maintained by a person who has delivered his dispatch for transmission and delivery on Sunday, for the reason that the penalty can not be recovered for the failure to perform an illegal contract. *Rogers v. Western Union Tel. Co.*, 78 Ind.

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169 (41 Am. R. 558). See, also, *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526 (46 Am. R. 175).

In the case of *Western Union Tel. Co. v. Harding, supra*, it was held, that under section 4176, *supra*, a telegraph company may regulate, reasonably, its office hours according to the requirements of the business at the various points where it holds itself out for public service, and that the penalty for failing to seasonably transmit a message is not incurred, unless there is a failure to receive and transmit during the usual office hours, both at the point where the message is received, and that to which it is transmitted.

In short, the holding of these cases is, that the telegraph company can not be held liable for the penalty where it has not, by the violation of some right, or the neglect of some duty (independent of some contract limiting its liability for damages), made itself liable to the sender of the message.

In the case before us, the evidence fails to show that the telegraph company violated any of the appellee's rights, or neglected any duty it owed to him. The message was promptly transmitted over the direct line from Gosport to Bedford, and promptly delivered to the person to whom it was addressed. To have sent it from the office on the Indianapolis and Vincennes Railroad, would have been to take it from the direct line provided by the company, send it hundreds of miles around, and subject the company to the liability that might result from mistake in the two necessary repetitions of the message. Having the direct line of wire between Gosport and Bedford; being ready and willing to, and having promptly transmitted the message over that line, it would be unreasonable to hold the company liable to appellee for having declined to send it over the other indirect and roundabout line. It would be as much, if not more, unreasonable to punish the company by the infliction of the penalty of one hundred dollars for having declined to do that which appellee had no right to demand should be done.

It was but a very short distance from one office to the

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other; the message was transmitted with less risk of mistake, and in less time than it would have been possible to transmit it over the other line. To allow appellee to recover the penalty of one hundred dollars, under the facts and circumstances of the case, would be, it seems to us, to turn the statute into an enginery of wrong and oppression.

We are not dealing with a question of conflict in the evidence, but there is here a total want of evidence to make a case against appellant under the statute. It results that the judgment must be reversed.

This conclusion makes it unnecessary to consider other questions discussed by counsel.

Judgment reversed, at appellee's costs, and cause remanded, with instructions to the court below to sustain appellant's motion for a new trial.

Filed Nov. 23, 1886.

108	314
134	136
135	35
108	314
136	205
108	314
142	371
108	314
144	492
108	314
154	872

No. 12,082.

THE PHYSIO-MEDICAL COLLEGE OF INDIANA' *v.* WILKINSON ET AL.

DEED.—*Cancellation.*—*Quieting Title.*—*Complaint by Heirs.*—*Showing of Interest.*—An allegation in a complaint to cancel a deed and quiet title, that the plaintiffs "are the heirs, and the only heirs, of" the grantor, who, it is averred, died on a certain date, shows that the plaintiffs have such an interest in the property as entitles them to maintain the action.

SAME.—*Mental Incapacity to Convey.*—*Old Age.*—*Presumption as to Continuance of Incapacity.*—*Pleading.*—A complaint by heirs to set aside a deed made by the ancestor three years before her death, alleging that at the date of the deed she was eighty years old, and so enfeebled and debilitated as to be of unsound mind and incapable of comprehending the nature of a contract, is good without averments that she had not subsequently been restored to reason, and had not ratified the contract, as it will be presumed, in such a case, until the contrary is made to appear, that the grantor remained of unsound mind. *Hardenbrook v. Sherwood*, 72 Ind. 403, distinguished.

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SAME.—Rescission.—Consideration.—When Need Not be Restored or Tendered.

—Where the consideration received by an insane grantor is neither necessary nor beneficial to him, upon his death a rescission of the conveyance may be had by his heirs without restoring or tendering what was received, although the grantor's insanity had not been judicially declared, and the grantee acted without knowledge of his incapacity.

From the Hamilton Circuit Court.

J. S. Duncan, C. W. Smith, J. R. Wilson, W. Wallace, L. Wallace, T. J. Kane and T. P. Davis, for appellant.

D. Moss, R. R. Stephenson and J. A. Roberts, for appellees.

MITCHELL, J.—The complaint in this case is in two paragraphs. The facts found by the jury in their special verdict show that the verdict and judgment rest exclusively upon the first paragraph. This is to all intents and purposes conceded in the briefs.

The burden of the appellant's argument is directed against the complaint, which is questioned here by assigning as error, "that the complaint does not state sufficient facts to constitute a cause of action."

We will consider only the first paragraph, as the appellees concede that there are no facts found by the jury which would sustain a judgment on the second, and under the rule, if there is one good paragraph, the assignment is not well made.

The material facts which appear in the first paragraph of the complaint are, that Margaret Wilkinson died intestate, on the 3d day of May, 1877, leaving the plaintiffs below as her only heirs at law. On the 11th day of April, 1874, the intestate was the owner in fee simple of three hundred and twenty acres of land in Marion county, of the alleged value of \$14,000. On the date above mentioned, she executed a deed conveying the land so owned by her, to the Physio-Medical College of Indiana, a corporation duly organized pursuant to law. The complaint alleges that at the time she made the deed in question, Margaret Wilkinson was eighty years old; "that she was greatly enfeebled and debilitated, both in mind and body, so much so that she was of unsound

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mind, and was not of sound and disposing memory," and was incapable of comprehending the nature of a contract or deed. It was also alleged that the deed was made without consideration; that the appellees had given notice to the appellants, before the commencement of the suit, of their disaffirmance of the conveyance on account of the mental unsoundness of the grantor, and that they had demanded possession of the land, which had been refused. They prayed judgment for the cancellation of the deed and the quieting of their title.

The consideration stated in the deed, a copy of which was filed with the complaint, is "Love and affection for the college." The deed contained this further recital, viz.: "Should a worthy young man or woman apply for admission, and not have the means to pay his or her tuition fee, he or she shall have said tuition fee gratis. It is my wish, should said students ever be able to pay said fees thereafter, they will refund said fees to the college, except the following: Silas M. White and Hannah M. White shall not pay for tuition."

The first objection urged to the complaint is, that it does not appear from any facts therein specifically stated, that the plaintiffs below had such an interest in the property in controversy as entitled them to maintain an action to cancel the deed. The allegation in that respect is as follows: "That, on the 3d day of May, 1877, Margaret Wilkinson died intestate; that the plaintiffs are the heirs, and only heirs of said Margaret Wilkinson, deceased."

The averment that the plaintiffs are the heirs of the intestate, it is said, is but the statement of a conclusion of law. We do not concur in this view. It was equivalent to a statement of the fact, that the appellees stood in such relation of kinship to Margaret Wilkinson, as that at her death the law of descents cast her estate upon them. If the appellant had deemed it important that the degree of consanguinity or affinity, relatively occupied by the deceased and the plaintiffs, should appear more in detail, a motion to make the complaint more specific might, with propriety, have been entertained.

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The objection that the complaint does not sufficiently allege that Margaret Wilkinson was of unsound mind at time she made the deed in question, is without substantial merit.

It is next contended that the complaint is fatally defective,—and this is the point chiefly relied on,—because it contains no averment that Margaret Wilkinson had been adjudged a person of unsound mind before the deed in question was made, and because it does not directly and distinctly aver that she was not restored to reason, and had not thereafter ratified the deed before her death.

The argument is, that a deed made by a person of unsound mind, who is not under guardianship, and whose mental unsoundness has not been judicially ascertained, is, at most, only voidable. Not being void, it is capable of ratification in case the grantor is again restored to reason ; hence it is said, since it does not appear by “direct and distinct” averment in the complaint, that Margaret Wilkinson had not recovered her reason between the 11th day of April, 1874, the date of the deed, and the 3d day of May, 1877, the date of her death, and had not meanwhile ratified the deed sought to be cancelled, the case is open to the presumption that such restoration and ratification may have occurred. This conclusion is said to follow from the ruling in *Hardenbrook v. Sherwood*, 72 Ind. 403.

Conceding the premises above stated, the conclusion predicated thereon is nevertheless irrelevant, and in our opinion unsupported by the authority relied on.

That the contract or deed of a person of unsound mind, whose mental incapacity has not been judicially declared, is only voidable, is an indisputable proposition, and that a deed or contract made under such circumstances may be affirmed after mental restoration, is equally beyond judicial controversy, but that a person eighty years old, so physically and mentally prostrated as to be of unsound mind, and incapable of comprehending the nature of a contract, will be presumed

from the lapse of time to have recovered her reason, is not maintainable either in reason or upon authority.

Hardenbrook v. Sherwood, supra, was a case in which one Walburn, in November, 1875, had become replevin bail for the stay of execution on certain judgments. About eighteen months thereafter he commenced an action to obtain relief from the obligation thus assumed, on the ground that at the time of becoming bail, he was of unsound mind. Subsequent to the commencement of the action Sherwood was appointed guardian, and the action was prosecuted in the name of the latter, upon the same complaint filed by Walburn. The opinion lays stress upon the fact that the action to rescind, then before the court, had been commenced by the person who was alleged to have been of unsound mind, at the time the contracts sought to be cancelled were made. In the course of the opinion the court said: "The original complaint in this cause was filed by and in the name of Edward Walburn, as sole plaintiff. * * * It will be observed that the allegation in the complaint, that the said Walburn was of unsound mind and wholly unable, incompetent and unfit to transact business of any kind, was limited to the precise time when he became replevin bail. * * * It was not alleged that, either before or after that day, he had been or was a person of unsound mind."

From premises thus stated, the court drew the conclusion that in the absence of an averment that Walburn had been judicially ascertained to be of unsound mind, until after the suit was thus commenced, it could not be "fairly inferred" that he was of unsound mind during the period intervening since he became replevin bail, nor could it be presumed that the disability under which he labored when he became replevin bail, was a continuing disability.

Manifestly, no other conclusion could have been reached with propriety, upon the facts stated. The facts now before us present a case widely different from *Hardenbrook v. Sherwood, supra*. "The presumption as to the continuance of

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insanity * * is one of fact," says an approved author, "varying with the particular case." 2 Whart. Ev., section 1253.

The rule as stated by this court in a case closely analogous is, that "when it appears in proof that a person was, at any given time, of unsound mind, (unless from some temporary or transient cause,) the legal presumption is, that that state of mind continues until the contrary is made to appear." *Crouse v. Holman*, 19 Ind. 30. *Musselman v. Cravens*, 47 Ind. 1; *Wade v. State, ex rel.*, 37 Ind. 180; *Kenworthy v. Williams*, 5 Ind. 375.

The rule does not apply to cases of occasional or intermittent insanity, but it does to all cases of apparently confirmed insanity of whatever nature. *State v. Wilner*, 40 Wis. 304; *Brooke v. Townshend*, 7 Gill, 10.

The complaint before us presents a case of mental unsoundness, accompanied with, and probably resulting from, the infirmities and decrepitude of old age. There is no presumption either of law or fact that passing years give release from such impairment of reason.

The next subject of complaint is the ruling of the court in overruling the appellant's demurrer to the second paragraph of the reply to the second paragraph of the answer.

The answer, to which the reply in question was directed, presented as a defence, in substance, that the grantor, in the deed sought to be cancelled, had not, prior to its execution, been declared a person of unsound mind; that she did not exhibit any appearance of mental unsoundness, and that the defendant, without knowledge of her alleged infirmity or disorder, accepted the deed in good faith. It averred further, that in pursuance of a stipulation contained in the deed, the college had afforded a medical education to a nephew and niece of the grantor free of charge, and that the cost and value of such education was \$500, which sum had never been repaid or tendered. In response to this, the reply set up

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that soon after the death of Margaret Wilkinson, to wit, in May, 1877, the defendant took possession of the land described, which had upon it a saw-mill, and a number of dwelling-houses, and that from rents received and timber sold, it had realized the sum of \$3,000, and that from waste committed on the land while in its possession, by carrying off valuable timber, the value of the land had been lessened in the sum of \$5,000.

The infirmity involved in the pleadings lies in the answer and not in the reply.

The rule in respect to contracts made with persons of unsound mind, whose mental incapacity has not been judicially declared, is, that where a contract is honestly made with such a person in ignorance of his mental disorder and incapacity, and the consideration of the contract is fair, and has been actually received and used for his benefit, a rescission can not be had without restoring or offering to restore what has been received. Some of the cases make an exception to this rule, in case the articles received by the person of unsound mind were not actual necessities, although beneficial to such person. *North-Western M. F. Ins. Co. v. Blankenship*, 94 Ind. 535 (48 Am. R. 185), and cases cited.

In the case above cited, a suit was brought to foreclose a mortgage, executed by a husband and wife on the estate of the husband. Both being dead, the wife having survived the husband, her heirs answered, that she was insane at the time she executed the mortgage, and that her debt thereby secured was the debt of the husband. The replies to this answer presented substantially the theory relied on in the answer under consideration here. After an exhaustive examination of the authorities, it was held, that because the wife was insane, and received no benefit from the contract, she became a subject for the protection of the court, and that her rights ought to be enforced for the benefit of her heirs.

As it is not claimed that the grantor in the deed under

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consideration received anything which was either necessary or beneficial to her, the facts set up in the answer presented no obstacle to a rescission by the heirs of the grantor.

Moreover, the reply under consideration was in itself sufficient. Having confessedly realized \$3,000 from the use of the land, even though we should assume that the appellant paid the current taxes while the land remained in its possession, it can not reasonably be contended that its claim for \$500 in tuition fees has not been fully liquidated.

Respecting the contention that the special finding of the jury is not supported by the evidence, little need be said. As we have before observed, the special verdict shows affirmatively that it is founded upon the first paragraph of the complaint. It may, therefore, be conceded—and the concession is made by the appellees—that there was no testimony given in support of the second paragraph, which proceeded on the theory that the conveyance had been obtained by fraud and undue influence. The facts found and returned are, however, abundantly sufficient to sustain a judgment on the first paragraph of the complaint, and the findings of the jury are sustained by evidence.

• It is conceded by counsel for appellant, that the questions arising on the special verdict are the same as those presented by the ruling on the complaint. These have been sufficiently considered in what has been said in that connection.

Some questions of minor importance are discussed, having relation to the admissibility of evidence heard during the progress of the trial.

To the admission of some of the evidence now complained of, the record fails to disclose any objection or exception.

In other instances the alleged error of the court in admitting evidence objected to, has not been assigned as a cause for a new trial.

The rulings of the court in respect to the points referred
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to are hence not so presented as to require further consideration.

The judgment is affirmed, with costs.

ELLIOTT, J., did not participate in the decision of this case.

Filed Nov. 23, 1886.

No. 12,514.

GREER v. WILSON ET AL.

REAL ESTATE.—Will.—Determinable Fee.—Husband and Wife.—Execution and Sale.—Where, by the will of her father, a daughter is given land in fee simple, subject only to the contingency that she shall die without issue, or that her surviving issue shall die before arriving at full age, the estate taken is a determinable fee, and upon her death her husband succeeds to an undivided one-third in fee, subject only to the same contingency, and such third is subject to sale on judgments rendered against him.

From the Fayette Circuit Court.

L. W. Florea, G. C. Florea, B. F. Claypool and J. H. Claypool, for appellant.

R. Conner, J. I. Little and H. L. Frost, for appellees.

NIBLACK, J.—This was a suit for partition by John S. Wilson and Frank J. Rhodes against Frank Greer, the complaint averring that the plaintiffs were the joint owners, in different proportions, of one undivided third part of certain real estate in Fayette county, and as tenants in common with the defendant, who was the owner of the remaining two-thirds of such real estate.

At the request of the defendant, the circuit court made a special finding of the facts which gave rise to the controversy between the parties.

The facts as thus found were:

First. That in October, 1863, Hiram Rees died testate,

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seized in fee simple of the real estate described in the complaint.

Second. That the said Rees left a last will and testament as follows: "I, Hiram Rees, of the county of Fayette and State of Indiana, being conscious of the uncertainty of life, * * * * * make and publish this, my last will and testament, in the manner following, that is to say: " *First*, directing the manner in which his funeral should be conducted, and, *Second*, providing for the payment of his debts and funeral expenses out of his personal estate, and then proceeding: "*Third.* I give and bequeath unto my beloved wife, Adah, all the balance of my personal estate absolutely, to be by her used and disposed of in such manner as her own good sense may deem just and right. *Fourth.* The occupancy and control, use, issues and profits of all the real estate of which I may die seized, and of every kind and description, and wherever situate, I also give and bequeath to my beloved wife, above named, during her natural life, desiring only that she shall preserve and take care of the same in a good and husbandlike manner, for the ultimate purpose hereinafter indicated. *Fifth.* I give and bequeath unto my beloved daughter and only child, Desire Greer, and to her heirs and assigns forever, the fee simple of all said real estate of which I may die seized, subject only to the life-estate of her mother as above provided. *Sixth.* It is however, my will, that in case my wife should marry again, thereupon her life-estate in the undivided one-half of my said real estate shall cease, and such half shall immediately vest in my said daughter, and her heirs, my said wife holding the other only during her lifetime, after which that also shall vest in my said daughter, and her heirs as aforesaid. *Seventh.* It is further, however, my will, that, in case my said daughter shall die without any heir of her body surviving, or in case of such heir, and it do not survive to full age, the undivided one-half of my said real estate shall go to my brother, Stephen Rees, and his heirs and assigns forever, and the other half shall be divided

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amongst my other kindred in the ascending line agreeably to the law of inheritance in that case provided."

The *Eighth* clause of the will only constituted and appointed Adah Rees, the wife of the testator, the executrix of his will, the substantial part of which is given as above.

Third. That said last will and testament was admitted to probate in the proper clerk's office of Fayette county, on the 13th day of November, 1863.

Fourth. That the said Hiram Rees left surviving him the said Adah Rees, as his widow, and his daughter, Desire Greer, as his only child or living descendant.

Fifth. That the said Desire Greer died intestate, on the 8th day of December, 1869, leaving surviving her William H. Greer, as her late husband, and the defendant, Frank Greer, as her only child and lineal descendant.

Sixth. That the said Adah Rees elected to take under the will of her said late husband, and accepted its provisions, in lieu of her interests under the statute, and settled the estate upon that basis.

Seventh. That the said Adah Rees died on the 28th day of December, 1884.

Eighth. That the defendant, Frank Greer, arrived at the age of twenty-one years on the 28th day of January, 1885.

Ninth. That one James R. Rhodes, on the 16th day of November, 1876, recovered a judgment in the Fayette Circuit Court against the above named William H. Greer, for the sum of \$68.59, bearing six per cent. interest, and for the further sum of \$543.41, with ten per cent. interest.

Tenth. That, on the 9th day of January, 1879, the said James R. Rhodes died intestate, leaving, as his widow, Martha J. Rhodes, and his adopted son, Frank J. Rhodes, as his only heirs at law surviving him.

Eleventh. That the said Martha J. Rhodes, in August, 1883, died intestate, leaving the said Frank J. Rhodes, one of the plaintiffs herein, as her only child and heir at law.

Twelfth. That the plaintiff John S. Wilson, on the 16th

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day of November, 1876, also recovered a judgment in the Fayette Circuit Court against the said William H. Greer for the sum of \$1,475.66, bearing ten per cent. interest.

Thirteenth. That, on the 1st day of August, 1881, executions were issued on the foregoing judgment to the sheriff of Fayette county, which he levied on the lands described in the complaint, and thereupon duly advertised said lands for sale on said executions, on the 3d day of September, 1881, at which time the plaintiff John S. Wilson and the said Martha J. Rhodes became the purchasers of such lands at sheriff's sale and received the sheriff's certificate of such purchase.

Fourteenth. That, on the 12th day of September, 1882, the said Wilson and the said Martha J. Rhodes received a sheriff's deed conveying to them the lands so purchased by them in the following proportions, that is to say, to the said Wilson $\frac{217915}{305738}$ parts thereof, and to the said Martha J. Rhodes the remaining $\frac{88723}{305738}$ parts of the same.

Upon the foregoing facts the circuit court came to the conclusion that the plaintiff Wilson was the owner in fee simple of the undivided $\frac{217915}{305738}$ parts of one undivided third part of the lands in controversy, and that the plaintiff Frank J. Rhodes was the owner in fee simple of the remaining undivided $\frac{88723}{305738}$ parts of said one undivided third part of said lands, and that the defendant, Frank Greer, was the owner in fee simple of the other two undivided third parts thereof; also that the plaintiffs were entitled to partition as demanded by their complaint.

Exceptions were reserved to the conclusions of law thus arrived at, and to the overruling of a motion for a new trial, after which judgment of partition was awarded, and proceedings in partition were accordingly consummated.

Several errors are assigned upon the proceedings in the circuit court, but each assignment of error involves the same controlling question, and that is, what estate did Desire Greer take under the last will of her father as herein above set out?

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In support of the objections to the proceedings below, it is sought to be maintained that Mrs. Greer took only a life-estate in the lands devised to her, with a remainder over to her son Frank, the appellant here, contingent upon his arriving at full age, and that, consequently, William H. Greer neither inherited, nor succeeded to, any estate in the land subject to execution upon the judgment against him, or any other interest in the same; that for that reason the appellees derived no title through the sheriff's sale.

In response to the claim thus made on behalf of the appellant, it is contended that Mrs. Greer took an estate in fee simple determinable on a future contingency, and that hence her husband, in virtue of his marital rights, became seized in fee of an undivided third part of the lands at her death, determinable only upon the same contingency.

Washburn on Real Property, vol. 1, pp. 61, 62, says: "As every estate which may be of perpetual continuance is deemed to be a fee, and may come within the definition of Lord Coke, of a fee simple absolute, conditional, qualified, or base fee, this seems to be a proper connection in which to treat of them." After giving some illustrations, the same author proceeds: "The term *determinable fee* seems to be more generic in its meaning, embracing all fees which are liable to be determined by some act or event expressed in their limitation to circumscribe their continuance, or inferred by law as bounding their extent."

This definition of a determinable fee is well sustained by the authorities, and appears to us to be entirely applicable to the estate taken by Mrs. Greer in question. This must be so unless the intervening life-estate of her mother made some other rule of construction necessary, and we know of nothing either in principle, or inculcated by authority, which would give such an effect to the life-estate. It follows that Mrs. Greer, at the death of her father, became the owner of the real estate left by him in fee simple, subject only to the contingency that she should die without issue, or that her surviv-

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ing issue should die before arriving at full age; in other words, that she became seized of a determinable fee in such real estate.

It further follows that, on the death of Mrs. Greer, her husband succeeded to one undivided third part of the same real estate as the owner in fee, subject only to the same contingency, and that the estate to which he so succeeded was subject to sale on the judgments rendered against him. 2 R. S. 1876, p. 232, section 526.

On the subject of determinable or conditional fees, see the cases of *Smith v. Hunter*, 23 Ind. 580; *Rush v. Rush*, 40 Ind. 83; *Gonzales v. Barton*, 45 Ind. 295; *Huxford v. Milligan*, 50 Ind. 542; *Helm v. Frisbie*, 59 Ind. 526.

The judgment is affirmed, with costs.

Filed Nov. 23, 1886.

No. 12,804.

ALLYN ET AL. v. ALLYN.

SUPREME COURT.—*Weight of Evidence.*—The finding of the trial court will not be disturbed, on appeal, upon the weight or sufficiency of conflicting evidence.

SAME.—*Immaterial Issue will be Disregarded.*—It is the duty of the trial court, and of the Supreme Court on appeal, to disregard, as immaterial, an issue joined on a bad paragraph of answer, and render judgment without reference thereto.

BASTARDY.—*Settlement by Infant Relatrix.*—*Promissory Note.*—*Record of Justice as to Provision for Child.*—It is no defence to an action by the mother of a bastard child, on a promissory note given in settlement of the bastardy proceeding, that she was at the time of the settlement a minor, and that the justice before whom the proceeding was pending failed to find and enter of record the fact that suitable provision had been made for the maintenance of the child, as required by section 994, R. S. 1881.

SAME.—*Substantial Compliance With Statute.*—Where all the entries in the justice's record, considered together, show a substantial compliance with

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the requirements of section 994, that is sufficient to bar another prosecution for the same cause and purpose.

From the Posey Circuit Court.

W. Loudon and F. P. Leonard, for appellants.

A. P. Hovey and G. V. Menzies, for appellee.

Howk, J.—This was a suit by appellee, Adelia Allyn, against the appellants, Otis and Walter C. Allyn, in a complaint of two paragraphs. Each paragraph counted upon a promissory note in the sum of \$83.33, dated May 17th, 1883, executed by the appellants and payable to the appellee, one in one year, and the other in two years, after the date thereof, with interest at the rate of six per cent. from date, with five per cent attorney's fees, and waiving valuation laws. In each paragraph of her complaint, appellee alleged that she could not file therewith the original note sued upon or a copy thereof, "for the reason that the same was, without her consent, taken and destroyed by defendant Otis Allyn, before the bringing of this suit, and that the whole of said note is due and remains unpaid." Wherefore, etc.

Appellants jointly answered in two special paragraphs, to which the appellee replied by a general denial. The issues joined were tried by the court, and a finding was made for appellee for the amount due on the notes, and, over appellants' motion for a new trial, judgment was rendered accordingly.

The only error assigned here by appellants is the overruling of their joint motion for a new trial. In this motion, the only causes assigned for such new trial were, (1) that the finding of the court was not sustained by sufficient evidence, and (2) that such finding was contrary to law. Ordinarily, where error is assigned here upon the overruling of a motion for a new trial, and it appears that the only causes, for which the new trial was asked, were such as the appellants assigned in this case, the single question for our consideration and decision may be thus stated: Is there legal evidence, properly

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in the record, which fairly tends to sustain the finding of the court, or the verdict of the jury, on every material point? Whenever this question can or must be answered in the affirmative, however conflicting the evidence may be, or however great, apparently, may be the preponderance of the evidence against the finding or verdict, it is well settled by our decisions that such finding or verdict will not be disturbed here, nor the judgment below be reversed, merely upon the weight or sufficiency of the evidence. *Rudolph v. Lane*, 57 Ind. 115; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Louisville, etc., R. R. Co. v. Zink*, 92 Ind. 406; *Smith v. Smith*, 106 Ind. 43.

In each paragraph of their answer, in the case under consideration, the appellants admitted their execution of the note sued upon therein, and, of course, assumed the burden of the issue joined upon their defence therein stated. The notes in suit were executed by the appellants in settlement of a proceeding in bastardy, instituted by the appellee against the appellant Otis Allyn, before a justice of the peace of Posey county. In the first paragraph of their answer, appellants alleged, in substance, that Otis Allyn was the principal, and Walter C. Allyn was surety, in the notes sued upon; that after the execution of such notes, appellee became the wife of Otis Allyn, and lived and cohabited with him; and that, during the coverture, appellee, with her own free will and consent, surrendered the notes in suit to her husband, Otis Allyn, as a gift, and he then and there accepted the same, and with her full knowledge and consent, and in her presence, destroyed such notes.

Upon the issue joined on the material averments of the foregoing paragraph of answer, the evidence was conflicting. While the appellants' witnesses largely outnumbered those of the appellee, yet it is manifest that the trial court believed, as it had the right to do, the evidence of the appellee as a witness, in her own behalf, in denial of her alleged gift to Otis Allyn of the notes in suit, and in denial of the alleged

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fact that such notes were destroyed by him with her consent. As the trier of the facts, the court below had opportunities and facilities for judging of the credibility of the different witnesses, and of the proper weight and value of the oral testimony of each witness, which we, as an appellate court, can not possibly have. As was said by us in *Rudolph v. Lane, supra*, we say again: "Courts do not, and ought not to, as a rule, weigh evidence by the number of witnesses testifying on each side. The evidence of one witness, even though a party, may, and often ought to, have more weight in the decision of the cause than the testimony of a dozen adverse witnesses. The court below must judge of the credibility of the different witnesses, and weigh and reconcile their clashing evidence; and, if their evidence can not be harmonized, the court below, or jury trying the cause, must determine which of the witnesses are the more worthy of belief. The conclusion arrived at by the triers of the facts, in cases of conflicting evidence, will always be respected and upheld by this court." See, also, *Lake Erie, etc., R. W. Co. v. Griffin*, 107 Ind. 464. We can not disturb the finding of the trial court, as to the issue joined on the first paragraph of answer in the cause now before us, upon the weight or sufficiency of the evidence.

In the second paragraph of their answer, appellants alleged that on the 15th day of May, 1883, the appellee, by her then name of Adelia Mills, and then an unmarried woman, commenced a proceeding in bastardy, before a certain justice of the peace of Posey county, charging in her complaint therein that the appellant Otis Allyn was the father of her bastard child, whereof she had then been delivered; that at the time she filed such complaint, and for more than one year thereafter, appellee was a minor, under the age of twenty-one years; that on the 17th day of May, 1883, the appellant Otis Allyn and the appellee appeared in the justice's court and attempted to compromise and settle such proceedings in bastardy; that the notes sued upon herein were executed by

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appellants for the purpose of effecting a valid settlement of such proceeding, and there was no other or different consideration for such notes; but that such attempted settlement was void and of no effect, because the justice of the peace, before whom such bastardy proceeding was had, did not make a finding that suitable provision had been made and properly secured for the maintenance of such bastard child, nor was any such finding ever entered of record in the justice's court. Wherefore appellants said there was no consideration for the execution of the notes in suit.

There was no demurrer by the appellee to this second paragraph of answer, but, as we have seen, she joined issue thereon by her reply in general denial. Appellants' counsel say, that they proved the material averments of this paragraph of answer by uncontradicted evidence and by the justice's record in the bastardy proceeding; and, therefore, they claim that, upon the issue joined on such paragraph, appellants were entitled to a finding in their favor, and, the court having found against them, to a new trial of such issue. It does not follow, however, by any means, that appellants were necessarily entitled to a finding and judgment in their favor, or to a new trial, merely because they had proved, by uncontradicted evidence, the truth of the allegations of the second paragraph of their answer, upon which issue was joined by a reply in denial. If the paragraph of answer was bad, and would have been so held on demurrer, then, no matter how well its allegations may have been proved, the issue joined thereon was an immaterial one, and it was the duty of the trial court, as it is our duty, to disregard such issue and render judgment herein without reference thereto. This is settled by our decisions. *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Dorman v. State*, 56 Ind. 454; *McCloskey v. Indianapolis, etc., Union*, 67 Ind. 86; *Miller v. White River School Tp.*, 101 Ind. 503; section 566, R. S. 1881.

In section 994, R. S. 1881, in force since August 24th, 1875, it is provided that if the prosecuting witness, in a bas-

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tardy proceeding, be a minor, she may dismiss such suit, if it be first shown to the satisfaction of the court in which the same is pending, that suitable provision has been made and properly secured for the maintenance of the child, and a finding of the court to that effect entered of record. And such entry shall be a bar to all other prosecutions for the same cause and purpose. Manifestly, these statutory provisions were enacted for the protection of the infant mother from further imposition by the man who had beguiled her, as well as to provide suitably for the maintenance of her child. Accordingly, it has been held in a number of similar cases, on behalf of an infant mother of a bastard child, that unless the record of the proper court affirmatively showed a finding of such court, that suitable provision had been made and properly secured for the maintenance of the child, such record would not constitute a bar to a further prosecution for the same cause and purpose. *Harness v. State, ex rel.*, 57 Ind. 1; *Fisher v. State, ex rel.*, 65 Ind. 51; *Malson v. State, ex rel.*, 75 Ind. 142.

But, in the case in hand, the appellee is not complaining of the terms of the compromise and settlement of her suit in bastardy against Otis Allyn, effected in the justice's court, nor is she seeking to prosecute him further for the same cause and purpose. On the contrary, she is apparently content with such compromise and settlement, and has ratified and fully confirmed the same, by instituting and prosecuting her present action on the notes given in consideration thereof, after she became of lawful age. We are clearly of opinion that the facts stated by appellants, in the second paragraph of their answer, were wholly insufficient to constitute a good defence to appellee's pending action; that the issue joined on such paragraph by the reply in denial was, therefore, an immaterial issue; and that even if it were true, as claimed by appellants' counsel, that the material averments of such paragraph of answer were fully proved by uncontradicted evidence,

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still it was the duty of the trial court to disregard such immaterial issue, and to find for the appellee, as to such issue without regard to the evidence.

We think, however, that appellants' counsel wholly misapprehend the force and effect of the justice's record, in the appellee's bastardy suit against Otis Allyn, which record they put in evidence in support of the second paragraph of answer. The justice's record, after entitling the cause and setting out the complaint in bastardy, proceeds as follows:

"May 17th, 1883. At this time comes the constable with the body of the defendant into court. The parties being present, Adelia Mills is sworn and examined, and her evidence reduced to writing by me, and the parties compromise this case between themselves, and the defendant is to pay the costs, and the said Adelia Mills to receipt the docket in full satisfaction."

The record then shows the justice's receipt for costs, and the receipt of Adelia Mills "in full satisfaction," which receipt, the evidence shows, was written by the attorney of Otis Allyn before the justice, as follows: "Received of Otis Allyn three hundred and fifty dollars, and it being shown to the satisfaction of the court that suitable provision has been made and properly secured for the maintenance of the bastard child born to me, of which said Otis Allyn is the father; and I hereby admit that provision for the maintenance of said child has been made, and I hereby dismiss this suit, this May 17th, 1883." This receipt is shown by the record of the justice to have been signed by Adelia Mills, and to have been attested by such justice.

Of course, this record of the justice was very informal, and was not prepared with any high degree of legal accuracy. But considering all the entries in the cause as constituting one record, we think it showed a substantial compliance with the requirements of section 994, *supra*, and would "be a bar to all other prosecutions for the same cause and purpose."

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We conclude, therefore, that no error was committed by the trial court, in any view of this cause, in overruling appellants' motion for a new trial.

The judgment is affirmed, with costs.

Filed Nov. 23, 1886.

108	334
124	35
136	17
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128	373
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136	464
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161	614

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THE SINGER MANUFACTURING COMPANY v. FORSYTH
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CONTRACT.—Consideration.—Parol Proof of Collateral or Contemporaneous Agreement.—Where a collateral agreement, whether oral or written, constitutes a condition upon which the performance of a written contract depends, or where a contemporaneous agreement of one party forms the consideration for the written contract, such collateral or contemporaneous agreement may be shown.

SAME.—Guaranty Bond.—Action on.—Consideration.—Showing Concurrent Contract of Agency.—In an action upon a bond, guaranteeing the payment, by the principal obligor, of every indebtedness to the obligee then existing or which might thereafter be incurred, but which states no consideration and shows by implication that it is collateral to some other agreement not mentioned, it may be averred and proved by parol that the consideration of the bond was a contract of agency executed concurrently with it.

SAME.—Liability of Guarantors.—Bond and Contract Construed Together.—In such case, the bond and the contract of agency, having been executed contemporaneously, are to be construed together, and the obligation of the bond will be limited to indebtedness arising under and embraced by such contract.

From the Decatur Circuit Court.

L. Maxwell and *D. Wilson*, for appellant.

J. D. Miller, *F. E. Gavin* and *J. S. Scobey*, for appellees.

MITCHELL, J.—The complaint in this cause charges that on the 27th day of October, 1874, William H. Forsyth, Columbus C. Burns and Elias R. Forsyth executed a joint and

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several bond to the Singer Manufacturing Company, conditioned that William H. Forsyth should pay, or cause to be paid, any and every indebtedness or liability then existing, or which might thereafter in any manner exist or be incurred, on the part of William H. Forsyth, to the Singer Manufacturing Company, whether such liability should exist in the shape of book accounts, notes, renewals, or extensions of notes or accounts, acceptances, endorsements or otherwise. A copy of the bond was filed with, and made part of, the complaint. The conditions of the bond are substantially as they are recited in the complaint.

It was averred that thereafter, in the year 1877, on the faith of the bond and in pursuance of its provisions, William H. Forsyth, for a valuable consideration, executed his four promissory notes, for amounts stated, to the Singer Manufacturing Company. Copies of the notes are set out. They are all payable at a bank in this State.

The complaint also charges, that pursuant to the above mentioned bond, William H. Forsyth transferred and delivered to the obligee in the bond, a certain note against one James H. Kersey, and that he (Forsyth) guaranteed the payment of the same to the plaintiff. It avers that the note so transferred and guaranteed is not collectible. It is alleged that all the notes are due and unpaid. Judgment is demanded as for a breach of the condition of the bond.

Neither the complaint nor the bond on its face discloses, unless by implication, any consideration whatever for the execution of the obligation sued on. It does not appear, either by averment in the complaint or recital in the bond, that William H. Forsyth was indebted to the Singer Manufacturing Company at the time the bond was executed, or that there was any business transaction of any kind had, or under contemplation, between him and the company at the time the bond was delivered.

So far nothing appears except that in 1874 the obligors signed and delivered the bond in suit to the Singer Manu-

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facturing Company, and that three years thereafter the notes described in the complaint were received on the faith of the bond, for a valuable consideration moving to the maker and guarantor of the notes. No question is made as to the sufficiency of the complaint, and we express no opinion on that subject.

Answers were filed in which, substantially, the following facts are made to appear, viz.: That the sole and only consideration for the execution of the bond declared on was, that concurrently with its execution the Singer Manufacturing Company, by a written agreement, constituted William H. Forsyth its agent, for the sale of its sewing machines in the county of Decatur, in the State of Indiana, the company agreeing to furnish him for sale, and to be leased, machines and accessories, at a discount of 35 per cent. from its regular list price. The contract stipulated that the agent should account monthly for all machines sold or leased by him, either with cash, or the note of the purchaser, or by giving his own promissory note, and at the termination of the agency return to the company all machines remaining unsold.

The answer alleges that this contract of agency continued until the 15th day of May, 1875, when it was superseded by a new contract, and that this new contract was superseded by a third, on the 3d day of October, 1876, which was followed by a fourth, dated May 13th, 1877. That finally on the 4th day of October, 1877, the agency was terminated, and a full and final settlement had between the company and its agent. This settlement, according to the answer, resulted in an absolute sale by the company to William H. Forsyth of all the machines then unsold in the possession of the latter, and which had been consigned to him under the previous contract of agency. The answer further avers that all of the foregoing contracts, except that executed contemporaneously with the bond in suit, were made without the knowledge or consent of the defendants, and that the notes sued on were executed in consideration of, and in payment for, the property pur-

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chased by Wm. H. Forsyth from the company on the 4th day of October, 1877, when the previous contracts were annulled and cancelled. There were also answers alleging that the bond had been executed without consideration.

Demurrers were overruled to all the answers which presented as a defence the facts above set out.

Upon issues made a trial was had which resulted in a finding and judgment for the defendants below.

It is contended here, that the demurrers to the answers, above summarized, should have been sustained, and that the court should have granted a new trial, because the finding was not sustained by any competent evidence.

The position which the appellant's learned counsel seek to maintain is, that since the bond in terms covers every indebtedness of William H. Forsyth, whether existing at the time the bond was executed, or which might thereafter exist or be in any manner incurred, it was not competent to aver, and prove by parol, that the sole consideration of the bond was the contract of agency, which was executed concurrently with it, and that it was error to confine the obligation of the bond to indebtedness arising under and embraced by such contract.

The argument is, that to permit the bond to be so restrained is in violation of the elementary principle which forbids that a plain and unambiguous contract should be varied, contradicted or added to by parol.

The rule that a formal written contract, which appears to be complete, will be presumed to be the repository of the final intentions of the parties, in regard to the subject-matter of the agreement, and that it excludes proof of any prior or contemporaneous parol stipulations which would contradict the writing, is abundantly settled, and should not, on account of its importance, be relaxed in any degree.

"It would be inconvenient," says Lord Coke, "that matters in writing made by advice and on consideration, and

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which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted." *Rutland's Case*, 5 Coke's R. 26.

Obligations which parties have deliberately entered into, and put in writing, can not therefore be pared down, taken away or enlarged by parol evidence.

The rule, however, has no application to a case in which it appears from the writing itself that it does not contain the whole agreement between the parties, nor does it operate to exclude proof of collateral or superadded agreements, provided the agreements so sought to be proved be not inconsistent with the writing. In such cases parol evidence of the collateral matter is admissible to the extent that it does not specifically add to, or contradict, or where it is necessary to complete, the original contract. *Trentman v. Fletcher*, 100 Ind. 105, and cases cited; *Chapin v. Dobson*, 78 N. Y. 74 (34 Am. R. 512); *Eighmie v. Taylor*, 98 N. Y. 288; *Jones Com. Cont.*, pp. 188-198.

This doctrine, carried, perhaps, on the facts of that case to its utmost limit, was applied in *Welz v. Rhodius*, 87 Ind. 1 (44 Am. R. 747), where the authorities illustrating the rule are collected.

The inquiry, therefore, of primary importance in the present case is, does the written instrument, which is put forward as the foundation of the action, appear to be complete in itself? or, does not the suggestion necessarily arise out of the very terms of the writing, that it is collateral to, and dependent upon, some engagement, either oral or written, between the obligee and principal obligor named in the bond?

The rule is abundantly settled that where a collateral agreement, whether oral or written, constitutes a condition upon which the performance of a written contract depends, or

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where a contemporaneous agreement of one party forms the consideration for the written agreement in question, such collateral or contemporaneous agreement may be shown. Stephen Digest of Ev., art. 90; Taylor Ev., section 1038; *Shughart v. Moore*, 78 Pa. St. 469; *Wilson v. Deen*, 74 N. Y. 531.

Looking at the bond, it becomes at once apparent that it is a special contract or promise on the part of the guarantors to answer for the debt, default or miscarriage of William H. Forsyth. Such a contract must be in writing, and but for section 4905, R. S. 1881, which provides that "The consideration of any such promise, contract, or agreement need not be set forth in such writing, but may be proved," the bond under examination, considered by itself, would be void as being an agreement partly in writing and partly in parol. *Gordon v. Gordon*, 96 Ind. 134, and cases cited; *Higham v. Harris*, ante, p. 246; *Hiatt v. Hiatt*, 28 Ind. 53; *Wilson Sewing Machine Co. v. Schnell*, 20 Minn. 40; *Simons v. Steele*, 36 N. H. 73; *Jones v. Post*, 6 Cal. 102.

That the necessity for setting forth the consideration in the writing is thus dispensed with, does not, however, avoid the necessity of proving the consideration upon which a contract of guaranty or suretyship was made, much less does the statute, or any rule of law, deprive a surety or guarantor of the right to aver and prove such consideration, or that it was made without any consideration. "There must be a sufficient consideration for a promise to pay the debt of another as well as for any other promise, otherwise it will not be binding though reduced into writing. A guaranty must have a consideration to support it. If it is made at the time of the contract to which it relates so as to constitute a part of the consideration of the contract, it is sufficient." Wood Statute of Frauds, section 102. Brandt Suretyship, etc., sections 6, 72 and 73; *Langford v. Freeman*, 60 Ind. 46; *Bridges v. Blake*, 106 Ind. 332.

Whatever we might have felt constrained to hold in respect to the failure of the appellant to aver and prove, that

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the bond was executed upon an adequate consideration, we can have no doubt that it was competent for the defendants below to aver and prove the original transaction and agreement between the Singer Manufacturing Company and William H. Forsyth. That agreement furnished the sole consideration upon which the collateral engagement of the appellants was entered into. Parol proof of this was admissible upon two grounds: *First*. Because the bond sued on, failing to state any consideration, was incomplete on its face. *Second*. The irresistible implication arising upon the face of the bond indicated that it was collateral to some other contract, which must be ascertained in order to determine the subject-matter to which it should be applied, and the consideration upon which it was made.

The bond and the contract of agency, having been executed contemporaneously, are to be read together. They are necessarily related to, and, so far as respects the bond, dependent upon each other.

The extent of the engagement of the guarantors is to be measured by the terms of the contract which they signed, considered in reference to the nature of the transaction under contemplation at the time, and the agreement entered into, by their principal, for the due execution of which they agreed to answer. *Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260, and cases cited; *Burns v. Singer M'f'g Co.*, 87 Ind. 541; *Grocers' Bank v. Kingman*, 16 Gray, 473.

The several liabilities which they engaged that their principal should "well and truly pay," must be confined to such liabilities as might arise under the contract which was executed concurrently with the bond, and without which the bond would in itself be meaningless, and unsupported by any consideration whatever.

This in no wise contradicts or varies the terms of the bond, but applies it to a subject-matter, and makes it intelligible, which otherwise it would not be.

It results that when the appellant terminated its contract

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of agency with William H. Forsyth, and, instead of receiving back its unsold property, made an absolute sale of machines to him, taking his notes therefor, it engaged in a transaction which was in no manner contemplated by, nor embraced within, the contract, the performance of which the bond was given to secure. Such a transaction was as much outside of the purview and consideration of the contract guaranteed, as if the company had sold land or loaned money to its agent. The bondsmen never engaged to answer for such a transaction.

The appellants rely on *Singer M'f'g Co. v. Hester*, 2 McCrary, 417, and *Domestic Sewing Machine Co. v. Webster*, 47 Iowa, 357. These cases are to some extent distinguishable in their facts from the case before us. To the extent that they hold that the bond, and the contract of agency executed concurrently therewith, have no relation to, or dependence upon, each other, and are not to be construed together, we are constrained to the view that they are not in accord with the adjudications of this court, nor are they, in our opinion, in harmony with the weight of authority on that subject. This will appear from an examination of the authorities already cited.

There was competent evidence to sustain the finding. The judgment is affirmed, with costs.

Filed Nov. 23, 1886.

108	341
137	470

No. 12,713.

WALKER ET AL. v. PITTMAN.

MALICIOUS PROSECUTION.—*Evidence.*—*Reputation for Peace and Quietude.*—

In an action for malicious prosecution it is error to admit, as evidence in chief for the plaintiff, testimony that at the time of an encounter between the parties, out of which the prosecution grew, the defendant was a man of bad reputation for peace and quietude.

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SAME.—Damages.—Attorney's Fees.—In an action for malicious prosecution the plaintiff is entitled to prove the value of the services of his attorney in defending the prosecution, without showing actual payment thereof.

From the Clinton Circuit Court.

T. J. Kane, T. P. Davis, B. Harrison, W. H. H. Miller, J. B. Elam and J. C. Suit, for appellants.

D. Moss and R. R. Stephenson, for appellee.

NIBLACK, J.—This was an action by Oliver Pittman against Emmett E. Walker, Elza J. Walker and Richard H. Walker for an alleged malicious prosecution. It was commenced in the Hamilton Circuit Court, and afterwards taken to the Clinton Circuit Court for trial. The plaintiff obtained a verdict for seven hundred dollars against Emmett E. Walker and Elza J. Walker, and, over a motion for a new trial and exceptions reserved, had judgment on the verdict.

The complaint charged that the defendants, in July, 1884, maliciously and without probable cause, caused the plaintiff to be arrested and taken before a justice of the peace of Hamilton county upon a charge of an assault and battery upon the said Emmett E. Walker, with intent to murder him, the said Emmett E. Walker, and had him, the plaintiff, recognized to appear in the circuit court of that county to answer such charge; also that the defendants maliciously and without probable cause procured the plaintiff to be tried in the circuit court upon such charge, on affidavit and information, where he was acquitted after having incurred great expense in his defence, and a temporary imprisonment in the county jail, and other injuries.

It came out at the trial as a part of the evidence in chief, introduced by the plaintiff, that previous to his arrest in July, 1884, there had been a personal collision between the plaintiff and his father on the one side, and the said Emmett E. Walker on the other, in which pistol shots were fired, and by reason of which the latter was injured, and that it was on

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account of that personal collision that the plaintiff was arrested and tried as above charged.

To sustain the issues on his part, and to support the allegations of his complaint, and as original evidence in chief, the plaintiff was, over objection, further permitted to prove by two witnesses, that at the time of the personal collision in question the defendant Emmett E. Walker was a man of bad reputation for peace and quietude in the neighborhood in which he lived, and the admission of that proof has been made a question upon this appeal.

It is quite impracticable to formulate any general rule as to the kind of evidence which must be introduced, or as to the facts which must be proven, to maintain an action of this kind in all cases, since, in the nature of things, each case of the kind must, to a great extent, rest upon the peculiar circumstances attending it. But there are certain general rules for the admission of evidence which apply as well to actions for malicious prosecution as to other causes, and one of these is that only such evidence is admissible as tends to support the issue, or some one of the issues, joined between the parties. In applying this last named rule to a case like this, it must be kept in view that probable cause does not depend, in point of fact, upon the actual state of the case, but upon the honest and reasonable belief of the party charged with maliciously prosecuting the action complained of.

The want of probable cause is a material averment, and, though negative in its form and character, it must be affirmatively proven by facts and circumstances which were within the knowledge of the defendant, unless the defendant dispenses with such proof by assuming the burden of the issue. The malicious motive, too, is a material averment, and must, in like manner, be affirmatively proven by the acts, declarations, or general conduct of the defendant. As to his innocence of the charge upon which he was prosecuted, the plaintiff is not required, as evidence in chief, to do more than put

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in evidence the record of his acquittal. He is not expected, and, as a general rule, ought not to be permitted, to retry the merits, in all its details, of the original action, to make out a *prima facie* case of innocence on his part, as well as a want of probable cause. 2 Greenl. Ev., sections 449 to 456, both inclusive; *Purcel v. McNamara*, 1 Campbell, 199; S. C., 9 East, 361; *Morris v. Corson*, 7 Cowen, 281; *Sterling v. Adams*, 3 Day, 411; *Bitting v. Ten Eyck*, 82 Ind. 421 (42 Am. R. 505).

In this case the bad character of Emmett E. Walker for peace and quietude, at the time of the collision between him and the plaintiff and his father, could not have constituted more than a collateral circumstance for the consideration of the jury at the former trial, and was hence in no sense original evidence in this action. 2 Greenl. Evi., section 458.

It did not tend to prove either malice in the prosecution of the criminal cause, or the apparent want of facts within the knowledge of the defendants to constitute probable cause. The natural consequence of the introduction of evidence of the bad character of Emmett E. Walker, as above set forth, was to indirectly make his character for peace and quietude an important element at the trial of this cause, and thus to divert the attention of the jury from the matters really in issue before them. In our opinion, therefore, the evidence under consideration was erroneously admitted, and the error was one for which a new trial ought to have been granted. It may have been that the defendants might have so shaped their defence as to have rendered evidence of the character of Emmett E. Walker, in the respect stated, admissible as rebutting testimony, but as to that the record discloses nothing, and hence nothing is now decided. We only hold, at the present hearing, that the evidence admitted was too remote as evidence in chief.

The plaintiff was also permitted to prove, over objection, the value of the services of his attorney in defending him upon the criminal charge, without showing that he had paid

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for such services, and that may again become a question in the cause. It is well settled upon the authorities, that in actions of the general class to which this belongs, expenses necessarily incurred may be taken into consideration in the assessment of the damages, without proof of actual payment of such expenses. Whether such expenses have been actually paid in any given case, raises a merely collateral question, with which the defendant has no concern. *Pennsylvania Co. v. Marion*, 104 Ind. 239. In actions for malicious prosecution the plaintiff is entitled to prove the amount of expenses he had to incur for attorney's fees. 4 Wait Actions and Defences, 351; 3 Sutherland Damages, 706; *Lawrence v. Hagerman*, 56 Ill. 68 (8 Am. R. 674).

The judgment is reversed, with costs, and the cause remanded for a new trial.

Filed Nov. 23, 1886.

 No. 12,870.

BARROW ET AL. v. BARROW ET AL.

FRAUDULENT CONVEYANCE.—*Husband and Wife. — Divorce. — Alimony. —*

Where a wife joins her husband in conveying the latter's land to a third person, in order to place it beyond the reach of an anticipated action against the husband, she can not, after obtaining a divorce, have the conveyance set aside and the land subjected to the payment of a judgment for alimony rendered in her favor.

From the Monroe Circuit Court.

R. A. Fulk, for appellants.

J. H. Loudon and *R. W. Miers*, for appellees.

ELLIOTT, C. J.—The appellee Mary Barrow brought this suit to set aside a conveyance executed to Rachel Barrow, and obtained the decree she sought.

David Barrow owned the land previous to his marriage

108	245
130	502
108	345
132	61
133	284
133	606

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with Mary, on the 1st day of July, 1883. Shortly after his marriage, July 9th, 1883, he and his wife executed the deed to his mother, one of the appellants. In May, 1884, a decree of divorce was granted Mary Barrow, and a judgment for one hundred and fifty dollars alimony was rendered in her favor. She seeks to set aside the conveyance to her husband's mother as fraudulent, and subject the land to the payment of her judgment. But it is clear that the evidence does not make a case in her favor, for, upon her own testimony, the case is against her. She testified: "The deed was delivered to Mrs. Barrow by David, and she was to hold the land to prevent the Langley set from getting it. We made the deed because I was afraid of the Langley set, for David had been going with one of the Langley girls before we were married. I was afraid the Langley girl would break David up; that the Langley woman would sue him for breach of marriage contract."

It is settled law that a voluntary conveyance is valid between the parties, and it is equally well settled that one who participates in a fraud can not avoid the transaction. These two principles would of themselves settle the case against the appellee, but there is still another reason why the appellee can not avoid the conveyance, and that is, she was in no sense a creditor of the grantor when the conveyance was made, and there is not the slightest evidence that the conveyance was made with intent to defraud her. It rests on the person who subsequently becomes a creditor seeking to set aside a fraudulent conveyance, to prove that there was an intent on the part of the debtor to defraud subsequent as well as existing creditors. *Stumph v. Bruner*, 89 Ind. 556.

Judgment reversed, with instructions to grant a new trial.

Filed Nov. 23, 1886.

Richey v. Merritt.

No. 12,549.

RICHEY v. MERRITT.

SHERIFF'S SALE.—*Judgment.*—*Subsequent Purchasers of Different Parcels of Land Bound by.*—*Execution.*—*Order of Sale.*—Where a judgment is a lien upon several parcels of land which are afterwards sold by the judgment defendant to different persons and at different times, a court of equity will compel a sale of such lands, to satisfy the judgment, to be made in the inverse order of their alienation.

SAME.—*Avoiding Sale.*—*Notice of Irregularities.*—An execution plaintiff, and the assignee of the judgment stands in that relation, is chargeable with notice of all irregularities in the issuance of the execution and in the sale of property under it, and when he becomes the purchaser the sale will be set aside for irregularities which could not be made effective as against an innocent third party, not so chargeable with notice.

SAME.—*Acquiescence.*—*Estoppel.*—Where a party has notice in time to prevent, by injunction or other proceeding, a sale of his land until parcels subsequently disposed of by the judgment defendant have been exhausted, but makes no objection until after the sale has been consummated, and shows no excuse for not doing so, he is estopped from asking to have the sale set aside on the ground that the proper priority was not observed.

SAME.—*Levy.*—*Presumption of Satisfaction of Judgment.*—*Voidable Alias Execution.*—*Waiver.*—*Estoppel.*—The levy of an execution upon property of sufficient value to pay the judgment, creates a presumption of the satisfaction of the judgment, and operates as such until the levy is legally disposed of, and an *alias* execution issued before such levy is disposed of is irregular and voidable, and may be set aside on motion made before the property is sold under it; but if the execution defendant waives his right to have such *alias* execution set aside, he can not afterwards question the validity of the sale on account of the irregular and voidable character of the execution.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

J. V. Kent and *J. W. Merritt*, for appellee.

NIBLACK, J.—This was a suit by John Merritt against James M. Richey and others to set aside a sheriff's sale of real estate. A demurrer was sustained to the complaint, and there was a judgment upon demurrer in favor of the defendants. Upon an appeal to this court the complaint was held

108	347
130	310
130	543
108	347
138	577
108	347
151	20
151	22

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to be sufficient and the judgment was reversed. *Merritt v. Richey*, 97 Ind. 236.

After the cause was remanded, the court tried the cause without a jury, and, upon proper request, made a special finding of the facts seemingly established by the evidence.

The finding in brief was, that on the 31st day of May, 1877, Marcellus Bristow was the owner and in the actual possession of lots 3, 4, 5 and 6, in block No. 15, in the town of Scircleville, in Clinton county, in this State; also of lots 1, 7 and 8, in said block No. 15, of said town; also of blocks Nos. 13, 14 and 16, in said town; that, on the 19th day of January, 1880, the said Bristow became, also, the owner of lots 3 and 4, in block No. 26, and of lots 1, 2, 7 and 8, in block No. 34, and of lots 1, 2, 3, 4, 5, 6, 7 and 8, in block No. 38, and of lots 1, 2, 3, 4, 5, 6, 7 and 8, in block No. 41, all in said town of Scircleville; that, on the 25th day of January, 1880, in a suit for partition in the Clinton Circuit Court, in which Lucinda Bristow and others were plaintiffs, and the said Marcellus Bristow and others were defendants, the northwest quarter of the southwest quarter of section 32, in township 22 north, range 2 east, in said county of Clinton, was, among other lands, assigned and set off to the said Marcellus Bristow; that, on the said 31st day of May, 1877, David P. Barner, cashier of the First National Bank of Frankfort, obtained a judgment in the Clinton Circuit Court against one Samuel Merritt, and against the said Marcellus Bristow personally, as well as against him as administrator of the estate of Williamson Farrar, deceased, for the sum of \$178.64, with costs of suit and interest at the rate of ten per cent. per annum; that, on the 3d day of April, 1879, the said Marcellus Bristow and his wife sold and by a warranty deed conveyed to John Merritt, the plaintiff herein, said lots 3, 4, 5 and 6, in block No. 15, in said town of Scircleville; that on the 23d day of September, 1879, the said Marcellus Bristow and his wife sold and conveyed to Joel A. Haden block No. 16, in said town of Scircleville, and all that

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part or parcel of land lying between said block No. 16 and the northwest quarter of the southwest quarter of section 3, in town. 21 north, range 2 east, in said county of Clinton; that, on said 23d day of September, 1879, the said Marcellus Bristow and his wife sold and conveyed to Samuel Armstrong all that part or parcel of land lying between said block No. 15, in the town of Scircleville, and the northwest quarter of the southwest quarter of said section 3, in town. 21 north, range 2 east; that, on the 16th day of February, 1880, the said Marcellus Bristow and his wife, in consideration of the sum of \$800, conveyed and warranted to the above named James M. Richey the northwest quarter of the southwest quarter of section 32, town. 22 north, range 2 east, of which the said Richey went into possession; that, on the 10th day of May, 1880, the said Marcellus Bristow and his wife conveyed to Samuel Merritt lots 1, 2, 7 and 8 in block No. 34, and lots 1, 2, 3, 4, 5, 6, 7 and 8 in block No. 38, and lots 1, 2, 3, 4, 5, 6, 7 and 8 in block No. 41, all in said town of Scircleville; and that, on the 18th day of May, 1880, the said Samuel Merritt and wife conveyed the same real estate to Richey; that, on the 16th day of February, 1881, the said Marcellus Bristow and his wife conveyed to Charles Howard lot 4 in block No. 14, in the same town of Scircleville; that, on the 13th day of April, 1880, David P. Barner caused an execution to be issued on the judgment so recovered by him, as herein above stated, and to be delivered to the sheriff of Clinton county; that said sheriff levied said execution on the northwest quarter of the southwest quarter of section 32, in town. 22 north, range 2 east, being the same land conveyed by Marcellus Bristow and wife to Richey as heretofore stated, and advertised the same for sale on the 11th day of September, 1880; that on the day last named, the said Richey paid to the said Barner the sum of \$163.60, being the amount of principal and interest then due on said judgment, and to the sheriff the further sum of \$43.50 in full of costs due thereon; that said execution was thereupon returned by the sheriff

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without making sale of the land so levied upon; that the said Barner, after so receiving the amount due on said judgment, assigned the same in due form to the said Richey; that the land upon which the execution was so levied was, on said 11th day of September, 1880, worth the sum of \$1,000; that, on the 23d day of October, 1880, another execution was issued on said judgment, at the request and for the use of Richey, and delivered to the sheriff of Clinton county, who levied the same on lots 3, 4, 5 and 6 in block No. 15, lots 1, 2, 3, 4, 5, 6, 7 and 8 in block No. 38, lots 1, 2, 7 and 8 in block No. 31, lots 1, 2, 3, 4, 5, 6, 7 and 8 in block No. 41, and upon block No. 16, all in the town of Scircleville aforesaid; also on all that part or parcel of land lying between said block No. 16 and the northwest quarter of the southwest quarter of section 3, town. 21 north, range 2 east; also on all that part or parcel of land lying between said block No. 15 and the northwest quarter of the southwest quarter of section 3, above described; also on the south half of the southeast quarter of the northeast quarter of section 36, in town. 22 north, range 2 east; that said real estate was advertised by the sheriff for sale on the 11th day of December, 1880, at which time he, the said sheriff, proceeded to offer said real estate for sale; that when the fee simple of the south half of the southeast quarter of the northeast quarter of section 36, herein above referred to, was offered for sale, the plaintiff, John Merritt, bid for the same the sum of ten dollars, and said tract of land was openly struck off and sold to him, the said Merritt, for that sum; that when the fee simple of said lots 3, 4, 5 and 6 in block No. 15, in the town of Scircleville, which had been, as already stated, conveyed by Marcellus Bristow and wife to John Merritt, the plaintiff, on the 3d day of April, 1879, was offered for sale, the defendant, Richey, bid for the same the sum of \$244.67, and said lots were in like manner struck off and sold to him, the said Richey, for that sum of money; that after the expiration of

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one year from the time of his purchase, Richey received a deed from the sheriff for said lots.

Upon the foregoing facts the circuit court came to the conclusion that the sheriff's sale of the lots, lastly above described, was illegal and void, and ought to be set aside, and judgment was rendered accordingly.

Richey alone appeals, and assigns error upon the conclusions of law stated by the circuit court.

When this cause was before us upon the former appeal, it was held to be a well settled proposition, that where a judgment is a lien on several parcels of land which are afterwards sold by the judgment defendant to various persons and at different times, a court of equity will compel a sale of such lands to satisfy such judgment, to be made in the inverse order of their alienation, and that is undoubtedly a correct statement of the law, abstractly considered. But the extent to which a court of equity will go in setting aside a sale of land on execution made in disregard of such inverse order of alienation is not, perhaps, so well settled. *Rorer Judicial Sales*, section 794; *Freeman Executions*, section 308.

An execution plaintiff is chargeable with notice of all irregularities which may have occurred both in the issuance of an execution and in the sale of property upon it. Hence, when an execution plaintiff becomes the purchaser, the sale will be set aside for irregularities which could not be made effective against an innocent third party not so chargeable with notice of mere irregularities. In this case, Richey, being the assignee of the judgment, stands in the relation of execution plaintiff to the execution which was issued after he became such assignee, and is to the same extent chargeable with notice. On the other hand, the execution defendant, by his acquiescence in irregularities in the proceedings upon an execution, including the sale of property upon it, may estop himself from obtaining an order setting aside such a sale. It is quite evident from the facts found by the circuit court, that Merritt, the plaintiff, might, at the proper time, have

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caused Richey to be enjoined from selling the particular lots in controversy in this case until the latter had first exhausted the lands more recently conveyed to others by Marcellus Bristow, or that he might, by other proceedings, have obtained an order in advance requiring Richey to make sale of the lands conveyed away by Bristow in the inverse order of their alienation. *Sansberry v. Lord*, 82 Ind. 521. But, as must have been observed, the special finding of facts contains nothing showing any excuse for the failure of the plaintiff to take measures for his protection either in the one or the other of the methods indicated. Upon the facts found, the reasonable inference is that the plaintiff had notice, in due time, of both the levy upon and the sale of his property, and that he made no objection to either until after the sale was consummated. It was then too late to object that the proper order of priority was not observed in making the levy as well as the sale. *Sansberry v. Lord, supra*.

It is also true, that the levy of an execution upon property, whether real or personal, of sufficient value to pay the judgment upon which it issued, creates a presumption of the satisfaction of such judgment, and operates as such until the levy is legally disposed of, either by the sale of the property or in some other lawful manner, and that an *alias* execution issued upon such judgment, before such a levy is legally disposed of, is both irregular and voidable, and may be set aside on motion if made before the property is sold upon it. *Freeman Ex.*, sections 49, 50; *Lindley v. Kelley*, 42 Ind. 294; *Frank v. Brasket*, 44 Ind. 92; *Neff v. Hagaman*, 78 Ind. 57; *Quakenbush v. Taylor*, 86 Ind. 270; *McIver v. Ballard*, 96 Ind. 76.

But where the execution defendant waives his right to have an *alias* execution so issued set aside, and permits his property to be levied upon and sold under it, he can not afterwards question the validity of the sale on account of the irregular and voidable character of the execution. *Doe v. Dutton*, 2 Ind. 309; *Sowle v. Champion*, 16 Ind. 165; *Oul-*

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bertson v. Milhollin, 22 Ind. 362; *Mavity v. Eastridge*, 67 Ind. 211; *Martin v. Prather*, 82 Ind. 535; *Martin v. Pifer*, 96 Ind. 245; *Rose v. Ingram*, 98 Ind. 276.

The objection, therefore, that the execution, in question in this case, was improvidently issued, and, in consequence, voidable, can not now be made available as a cause for setting aside the sale made upon it. *Freeman Ex.*, section 307.

By a recurrence to the opinion pronounced in this case at the former appeal, it will be seen that there was an averment in the complaint making an excuse for the plaintiff's delay in objecting to the sale of his property, but that averment was not sustained by the facts as found at the trial, and hence as to that averment it must be inferred that the evidence was not sufficient to support it. The plaintiff, therefore, in a very material respect, failed to make out the case presented by his complaint. As to the parties who may complain of irregularities in proceedings upon an execution, see the cases of *Weaver v. Guyer*, 59 Ind. 195, and *Jones v. Carnahan*, 63 Ind. 229.

The judgment is reversed with costs, and the cause is remanded with instructions to the circuit court to restate its conclusions of law in accordance with this opinion, and to render judgment thereon in favor of the defendant below.

Filed Dec. 7, 1886.

No. 13,224.

THE STATE v. REYNOLDS.

TAXES.—Tax-Lists.—Verification.—Under the law of this State, the list of personal property which the owner is required to make for tax purposes must be sworn to by such owner.

SAME.—Assessor.—Power to Administer Oaths.—The assessor and his deputies have authority, under the statute, to administer all necessary oaths in connection with tax-lists.

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SAME.—Repeal of Statute.—The repeal of "all laws within the purview" of the repealing act does not include the provisions of any statute in relation to cases not provided for by such repealing act.

SAME.—Assessment of Moneys and Credits.—Residence of Owner.—All residents of a township on the 1st day of April, or at any time between that day and the 1st day of June, the time when the assessor is required to complete his assessment, are taxable in that township for their moneys and credits, owned on the 1st day of April, except such as have become residents subsequent to the last named date and have been assessed, and are held for tax, upon such moneys and credits in the taxing district from which they have moved, as provided in section 6298, R. S. 1881.

SAME.—Criminal Law.—False Tax-List.—Residence.—Indictment for Perjury.—Negating Exception in Statute.—An indictment for perjury committed in swearing to a tax-list, falsely stating the amount of moneys and credits owned by him, must show that the defendant was taxable for such property in the township in which the list was made, either by alleging that he was a resident of such township on the 1st day of April, or by negating the exception contained in section 6298, and thus showing that, although he became a resident of the township after the 1st day of April, he had not been assessed upon his moneys and credits in the taxing district from which he had moved.

CRIMINAL LAW.—Perjury.—Material Matter.—An indictment for perjury can not be predicated upon an oath in relation to an immaterial matter.

From the Delaware Circuit Court.

F. T. Hord, Attorney General, *C. L. Medsker*, Prosecuting Attorney, and *J. N. Templer*, for the State.

W. Brotherton and *C. E. Shipley*, for appellee.

ZOLLARS, J.—The court below quashed the indictment, in which appellee is charged with having committed perjury in swearing to a tax list, in which he stated the amount of his moneys on deposit, and the amount loaned. That ruling is assigned here as error.

Had the assessor authority to administer the oath? That is the question upon which counsel lay the most stress in their arguments.

Counsel for appellee contend that he had not, because it is not expressly given by the statute, although such authority is recognized therein. They cite us to former statutes where

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it was expressly given, as supporting their contention that unless so given, it is not given at all.

The act of 1843, R. S. 1843, p. 190, was an act independent of the tax law, provided for the election of a county assessor, prescribed his duties, and expressly gave him and his deputies authority to administer all oaths, contemplated by law in the discharge of their duties as assessors.

The tax law of 1852 provided for the election of township assessors, thus dispensing with the county assessor provided by the act of 1843. 1 R. S. 1852, p. 122; 1 G. & H., p. 90.

Section 23 of that act required an oath by persons making tax lists of personal property, and provided as follows: "Which oath * * may be administered by the assessor or his deputy, who are hereby authorized to administer all oaths * * that may be required in the performance of any of the duties of their office." 1 R. S. 1852, p. 109; 1 G. & H., p. 72.

That section was amended in 1869, but not changed in the particulars above stated. Acts 1869, Spec. Sess., p. 122. The act of 1852, *supra*, clearly repealed the act of 1843, as it provided for township assessors, instead of one assessor for the county, and covered the whole ground of the duties and authority of such assessors.

The tax law of 1872 again provided for the election of a county assessor, and again definitely fixed his duties and authority, including the authority to administer oaths. Acts 1872, p. 87, section 107. That act again clearly repealed the act of 1852. Section 107, last above, was amended in 1875, so as to provide for the election of township assessors.

Section 50 of the act of 1872, defining the authority of assessors to administer oaths, etc., was left as originally adopted. It provided that the assessor should require persons making tax lists of personal property, to take and subscribe on such statements, an oath as to their correctness, etc., and in substantially the language of the act of 1852, provided: "Which

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oath * * may be administered by the assessor, or his deputy, who are hereby authorized to administer all oaths * * that may be required in the performance of the duties of their office." 1 R. S. 1876, p. 85.

The tax law of 1881 again provides for the election of township assessors (R. S. 1881, sections 4735, 6374), and, with an exception, not material here, repeals all laws within the purview of the act. Acts 1881, p. 695, section 261.

We turn now to the act of 1881, to ascertain whether or not it requires an oath as to the correctness of tax lists of personal property, and as to whether or not it authorizes the assessor to administer such an oath.

That tax lists must be sworn to by the persons making them, and that the oath covers everything required to be stated in the lists, including money on hand and on deposit, and money loaned, is made very clear by the various sections of the statute. R. S. 1881, sections 2150, 6312, 6313, 6314, 6316, 6328, 6330, 6331, 6334, 6336, 6337, 6345, 6357, 6361, 6369, 6389. For the proper construction of section 6332, cited by counsel, see *Wasson v. First National Bank*, 107 Ind. 206.

The various sections just as clearly require persons to make a full and complete list of all their personal property, including money on hand or on deposit, and money loaned, owned on the 1st day of April of the current year.

Has the assessor authority to administer the oath?

After providing that persons to be assessed shall make a list of their personal property, and affix a fair cash value to each item, section 6330 provides, that the assessor may determine the value by an examination of the statement, "and, also, an examination, *under oath*, of the party, if he deem it necessary."

Section 6331 provides, that persons required by the assessor to list property, shall answer certain interrogatories under oath, upon the tax list to be furnished by the assessor, "*who shall also administer the oath.*"

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Section 6334 provides, that when deductions of debts from credits are claimed, the assessor shall require that such deductions be verified by the oath of the person claiming the same.

By section 6340, the assessor is authorized, in case any person shall refuse to furnish a list, to "examine on oath" any person whom he may suppose to have knowledge, etc.

Section 6341 provides, that if any person shall refuse to swear, as in the prior section provided, or, having been sworn, shall refuse to answer the interrogatories, etc., he shall, upon conviction, be fined.

By section 6378, the assessor is authorized to examine, under oath, persons whom he may suppose to have knowledge of real estate, when the owner neglects to furnish a list.

Various other sections of the statute provide that the assessor may require persons to make oath, etc. Indeed, in almost, if not in every instance, where there is mention of an oath to the schedule, it is provided that it shall be required by the assessor. In one instance, as we have seen, it is provided in so many words that he shall administer the oath. It is not so provided, and clearly was not intended, that any person should accompany the assessor to administer the oaths required in verification of the tax lists, and in the examination of persons in relation to property. And just as clearly, it was not intended that farmers should be required to leave their farms and go to a distant justice of the peace, notary public, or other officer, to swear to their tax lists. All the way through, the statute proceeds upon the theory that the assessor and his deputies shall administer all necessary oaths in verification of the tax lists. And finally, section 6396 provides that, "If any assessor or deputy assessor shall fail or neglect to administer to any person, by him assessed, any oath required by this act to be administered, he shall forfeit and pay to the State of Indiana, for the use of the school fund, the sum of twenty dollars for each case of such omission and neglect, which may be recovered by an action in the name of the State of Indiana, on the relation of the prose-

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cuting attorney, before any justice of the peace of the county, together with the costs of such action."

Considering the statute as a whole, we think the intention of the Legislature clearly was, that the assessor and his deputies should have authority to administer all necessary oaths in connection with tax lists, and that such authority is given by the statute.

If it were necessary, it might reasonably be held that so much of the act of 1872 as provides that the assessor and his deputies "are hereby authorized to administer all oaths * * that may be required in the performance of the duties of their office," was not repealed by the act of 1881. That act repealed, as we have seen, all laws within the purview of the act.

In the case of *Payne v. Conner*, 3 Bibb (Ky.) 180, it was said: "The meaning usually attached to this term (purview) by writers on law, seems to be the enacting part of a statute, in contradistinction to the preamble; and we think the provision of the act repealing all acts or parts of acts coming within its purview, should be understood as repealing all acts in relation to all cases which are provided for by the repealing act; and that the provisions of no act are thereby repealed in relation to cases not provided for by it."

The act of 1881, like the act of 1872, as amended, provides for the election of township assessors. If it be said that the act of 1881 does not confer authority upon the assessor to administer oaths, necessary in the discharge of his duties, yet no one would contend that it does not recognize the existence of such authority. And if it should be conceded that the act of 1881 does not confer authority upon the assessor to administer such oaths, we should have, in the language of the Kentucky court, a case not provided for by the act, and hence not within the purview of that act.

Upon the question of repeal see *Zonker v. Cowan*, 84 Ind. 395; *City of Evansville v. Summers*, ante, p. 189.

In any view that may be taken of the question, we think

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that it should be held, and without hesitation we do hold, that the township assessor has authority to administer oaths to persons in verification of their tax lists.

Following in the order of importance, rather than in the order of discussion by counsel, we pass to the contention of appellee's counsel, that it is not shown, by any charge in the indictment, that he was a resident of the township, in which the list was made, on the 1st day of April.

So much of the indictment as relates to this contention is as follows: "The grand jurors of Delaware county, in the State of Indiana, present, that Breckenridge Reynolds, late of said county, on the 17th day of April, 1884, at said county * * * and State, * * * was then and there a resident of Monroe township, in said county, * * * and was then and there the owner of certain taxable personal property, and was then and there required by law to list the same for taxation, and then and there to make to the then assessor of said Monroe township, upon an assessment blank which was furnished to him * * * by the assessor for that purpose, a full and correct description of all the personal property of which he * * * was the owner on the 1st day of April, 1884, and to affix, upon and in said assessment blank, what he * * * then and there deemed the fair cash value thereof to each item of his said personal property, * * * and he * * * was then and there required by law to list in said Monroe township, amongst other things, all his moneys, * * * moneys loaned or invested; * * * and, also, moneys deposited subject to his order, check, draft, and credits due from, or owing by any person * * * to him, * * * without regard to the place where the same existed or was situated; and the said * * * Reynolds, on said 17th day of April, 1884, at said county, * * * was then and there requested by * * * the then assessor within and for Monroe township, in Delaware county, * * * Indiana, to list for taxation, and to make to said assessor a full and correct description of all his said personal property of which he * * * was the owner on the 1st day

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of April, 1884, and for compliance with the said request, * * * the said * * * Reynolds, on the 17th day of April, 1884, * * * in said Monroe township, * * * did then and there, before * * * the assessor of said * * * township, take his corporal oath, and make affidavit in writing," etc.

The substance of the charge is, as will be seen from the above statement of the indictment, that appellee was a resident of Monroe township, Delaware county, on the 17th day of April, 1884; that he then and there owned certain taxable personal property, including moneys, moneys loaned, and also moneys deposited, and credits due, etc., and was then and there requested by the assessor of the township, and required by law, to make and deliver to the assessor, upon a blank furnished by him, a full and correct description of all his said personal property owned on the 1st day of April, 1884, and as to the moneys deposited and loaned, and the credits due, "without regard to the place where the same existed or was situated."

The request by the assessor, of course, amounts to nothing unless he had a right to make such a request, and the averment, that the law required appellee to make to the particular assessor a list of his personal property, owned on the 1st day of April, is but a conclusion, and not the statement of a fact, and hence adds nothing to the indictment. The facts, and not conclusions, must be stated. *State v. Thrift*, 30 Ind. 211; *State v. McDonald*, 106 Ind. 233.

The only averment in the indictment as to appellee's residence is, that he was a resident of Monroe township, Delaware county, in this State, on the 17th day of April, 1884. If, in order that he might be assessed for his moneys, credits, etc., in that township for the year 1884, it was necessary that he should have been a resident of the township on the 1st day of April of that year, the indictment is insufficient for the want of an averment of that fact. Upon that theory, he might have been a resident of the township on the 17th day of April, 1884, as charged, and yet not be liable to be there

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taxed for that year. *Stribbling v. State*, 56 Ind. 79. Courts can not assume or presume anything in support of an indictment.

This prosecution rests upon section 2006, R. S. 1881. The alleged oath was taken in a matter, in which by law an oath is required, as we have already determined, and hence it must appear from the averments in the indictment, that the oath was touching a matter material to the point in question.

If, to tax appellee in Monroe township for his moneys, credits, etc., it was necessary that he should have been a resident of that township on the 1st day of April, and he was not such a resident, it was not material, so far as concerned an assessment in that township, what moneys, credits, etc., he may have owned on the 1st day of April, when a resident of some other township, county or State. And such ownership not being material, perjury could not be predicated upon an oath in relation thereto. *Burgh v. State, ex rel., ante*, p. 132, and cases there cited; *Lose v. State*, 72 Ind. 285; *State v. Anderson*, 103 Ind. 170; *State v. Welch*, 88 Ind. 308.

The general rule, as prescribed by our statute, is, that persons shall be taxed in the township in which they reside on the 1st day of April, for the amount of personal property they own on that day. R. S. 1881, sections 6280, 6283, 6290, 6330, 6336.

Section 6285 makes an exception to the general rule, but that exception does not affect the case in hearing.

Section 6286 requires the owner to list in the township where he resides, all his moneys, bonds, etc., moneys loaned, or invested; and also all moneys deposited subject to his order, check, or draft, and credits due from or owing by any person, etc., to him, without regard to the place where the said taxables may exist or be situated.

If there were nothing further, doubtless, the general rule would apply to the owners of moneys and credits, and require them, in all cases, to be taxed in the township where they may reside, on the 1st day of April.

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Section 6298 makes another exception to the general rule, and provides that the owner of personal property, removing from one county, township, city or town to another, between the 1st day of April and the 1st day of June, shall be listed and assessed in either of which he is first called upon by the assessor. And, further, that the owner of personal property moving into the State from another State, between the 1st day of April and the 1st day of June, shall be listed for the property owned by him on the 1st day of April of such year, in the county, township, city or town into which he has so moved: "*Provided*, If such person has been assessed (and can make it appear to the assessor, by official certificate or by affidavit, that he is held for tax of the current year) on his property in another State, county, township, city, or town, he shall not be again assessed for said year."

Considering this section in connection with the other sections of the statute, can it be properly said, that the facts alleged in the indictment may be true, and appellee innocent of the offence intended to be charged?

As we have seen, the allegation that he was a resident of Monroe township on the 17th day of April, does not show that he was a resident of the township on the 1st day of that month. The sufficiency of the indictment, therefore, must be determined upon the theory that he was not a resident of that township on the 1st day of April. Was it, then, necessary to the sufficiency of the indictment to go further, and by proper averments show, that he did not come within the proviso, or exception, in the above section of the statute,—in other words, that, having become a resident of the township subsequent to the 1st day of April, he had not been assessed, and was not held for tax upon his moneys and credits, in the municipality from which he moved?

As alleged in the indictment, he was a resident of Monroe township on the 17th day of April, 1884. That being so, under the last above section of the statute, his moneys and credits, owned on the 1st day of April, were taxable in that

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township for that year, no matter how nor when, prior to the 17th day of April, he became a resident of the township, unless he had been assessed, and was held for tax on such moneys and credits in another taxing district from which he had moved subsequent to the 1st day of April.

In other words, under the last above section of the statute, a resident of a township at any time between the 1st day of April and the 1st day of June, or the time when the assessor is required to complete his assessment, is taxable in that township for his moneys and credits owned on the 1st day of April, unless, having become a resident of the township subsequent to that day, he has been assessed, and is held for tax on such moneys and credits in the township, etc., from which he moved.

To state the proposition in a different form: All residents of a township, on the 1st day of April, or at any time between that day and the 1st day of June, or the time when the assessor is required to complete his assessment, are taxable in that township for their moneys and credits owned on the 1st day of April, except such as have become residents subsequent to the 1st day of April, and have been assessed, and are held for tax upon such moneys and credits in the township, etc., from which they have moved.

To abridge the statement: All residents of a township on the 1st day of April, or at any time between that day and the 1st day of June, or the time when the assessor is required to complete his assessment, with the exception stated, are taxable in that township for their moneys and credits, owned on the 1st day of April.

We thus have a statute for the taxation of all residents of the township, between the dates stated, with a proviso, or exception, excepting from its operation a certain class of residents.

As we have said, to show that the alleged oath was touching a matter material to the point in question, it must be

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shown that appellee was taxable for his moneys and credits in Monroe township for the year 1884.

That can be shown in but two ways: *First*. By an allegation that he was a resident of the township on the 1st day of April of that year; and, *Second*. By negating the exception in the above section of the statute, and thus showing, that although he became a resident of the township after the 1st day of April, he had not been assessed, and was not held for tax upon his moneys and credits in the taxing district from which he had moved.

As we have seen, the charge that he was a resident of Monroe township on the 17th day of April, 1884, does not show that he was a resident of that township on the 1st day of that month; nor does it, of itself, show that he was taxable in that township for that year, because it falls short of averring the facts necessary to make him thus taxable.

This is a case, we think, in which the charge in the indictment should negative the exception in the statute. See *Montgomery v. State, ex rel.*, 53 Ind. 108; *Dillon v. State*, 9 Ind. 408 (412); *Peterson v. State*, 7 Ind. 560; *Brutton v. State*, 4 Ind. 601; *Kinser v. State*, 9 Ind. 543; *Weaver v. State, ex rel.*, 8 Blackf. 563; *Ezra v. Manlove*, 7 Blackf. 389; *Struble v. Nodwift*, 11 Ind. 64; 1 Bishop Crim. Proc., section 636, *et seq.*

It results from the above conclusions, that the indictment is insufficient, and that the court below did not err in sustaining the motion to quash.

A number of other points are ably discussed by counsel, but as we have extended this opinion, in the decision of the more important questions presented, we do not think it advisable to further extend it in the decision of the other questions discussed.

Judgment affirmed.

Filed Dec. 7, 1886.

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No. 12,851.

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PATENT RIGHT.—*Regulation of Sale by State.*—*Police Power.*—*Constitutional Law.*—The statute of this State requiring the vender of patent rights to file with the county clerk copies of the letters patent, and to make an affidavit that the letters are genuine and unrevoked, and that he has authority to sell, is a police regulation, and constitutional and valid.

SAME.—*Promissory Note.*—*Words Required to be Inserted in.*—The provision in such statute that the words "given for a patent right" shall be inserted in any obligation taken from the vendee of a patent right, is also a police regulation, but, aside from that, it is valid as a regulation concerning promissory notes.

SAME.—*Sale of Right to Use and Manufacture.*—*Interest Taken Under.*—The statute applies to a sale of the right to use and manufacture for sale and use, within a specified territory, the patented article, for such a sale is a grant of all the beneficial interest possessed by the patentee in such territory, and carries with it an interest in the patented right itself.

SALE.—*Consideration.*—One who assumes to transfer what the law prohibits him from transferring, unless he does certain acts, can not yield a valid consideration to the person with whom he deals.

PROMISSORY NOTE.—*Patent Right.*—*Sale.*—*Non-Compliance with Statute.*—*Notice of Consideration.*—A promissory note, taken by the vender of a patent right who has not complied with the statute, which does not contain the words "given for a patent right," is inoperative as between the parties and as to one who buys with notice that it was given for such right, unless the latter affirmatively shows that his endorser was a good-faith purchaser.

SAME.—*Inquiry.*—Knowledge that a note, which does not contain the words required by the statute, was given for a patent right, puts a purchaser upon inquiry as to whether the vender of the right had complied with the law regulating sales thereof.

SAME.—*Payable to Bearer.*—*Negotiability.*—A note payable to bearer is negotiable as commercial paper, if it possesses the other essential requisites of such instruments.

SAME.—*Statute Declaring Void.*—*Illegal Consideration.*—Where a statute, in direct terms, declares void a promissory note when given for a vicious consideration, it is ineffective even in the hands of a good-faith holder.

SAME.—*Innocent Holder.*—The statute regulating the sale of patent rights does not either expressly or by necessary implication declare void a note taken by a vender who has not complied with the law; and where a negotiable note is executed to such person, it is valid in the hands of an innocent holder.

PLEADING.—*Erroneous Ruling Upon Not Cured by Special Finding.*—Error in

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sustaining a demurrer to a good reply, to which ruling an exception is duly taken, can not be cured by the special finding.

From the Hamilton Circuit Court.

B. F. Davis, J. Brownfield, T. J. Kane and T. P. Davis,
for appellant.

R. R. Stephenson and W. R. Fertig, for appellee.

ELLIOTT, C. J.—The complaint of the appellant is based on a promissory note written in the usual form, payable in a bank of this State, and payable to bearer.

The answer alleges that the note was executed in consideration of the sale and transfer to the appellee of the right to use, and sell for use, in a designated part of the State, an agricultural boiler and steam feeder, for which Puntan, to whom the note was executed, had obtained letters patent; that the sale and transfer of the patent took place in Hamilton county, in this State, on the 10th day of June, 1884; that Puntan had not then filed with the clerk of the court of that county a copy of his letters patent, nor had he filed an affidavit that the letters were genuine and had not been revoked, and that he had authority to barter or sell the right to use the patented article; nor was there any clause in the note stating that it was "given for a patent right." It is also averred that the appellant knew that the note was given in payment for a patent right before she purchased it.

We have had occasion to consider the validity of our statute imposing certain duties upon the venders of patent rights, and have expressly decided that, in so far as it requires an affidavit from the vender of his authority and charges him with the duty of filing a copy of the letters patent, it is not in conflict with the Federal Constitution. *Brechbill v. Randall*, 102 Ind. 528 (52 Am. R. 695).

The reasoning of other cases decided by this court carries the doctrine somewhat further, and they lay down a principle that would, if carried to its logical conclusion, sustain the entire statute. *Fry v. State*, 63 Ind. 552; *Toledo Agr'l Works*

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v. *Work*, 70 Ind. 253; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1; *Hockett v. State*, 105 Ind. 250 (55 Am. R. 201)..

We accept as correct the conclusion to which the reasoning of these cases leads, and affirm that our entire statute is valid, and that it neither usurps any powers of the Federal government nor encroaches upon the National Constitution nor violates any law of Congress. This conclusion is fully supported by the decision of the Supreme Court of the United States in *Patterson v. Kentucky*, 97 U. S. 501, and by other decided cases. *Tod v. Wick*, 36 Ohio St. 370; *Haskell v. Jones*, 86 Pa. St. 173.

There are, as we know, cases which assert a different doctrine, but they are all based on the decision in *Ex parte Robinson*, 2 Bissell, 309, and as that decision has been overthrown, the cases based upon it must fall. *Toledo Agr'l Works v. Work*, *supra*; *Fry v. State*, *supra*; *Brechbill v. Randall*, *supra*.

In imposing upon venders of patent rights the duty of filing affidavits and copies of letters patent, no powers vested in the Federal government are usurped, nor are the provisions of the National Constitution trespassed upon, for nothing more is done than to prescribe a system of procedure for the protection of our citizens against imposition and fraud. No more is done by that part of the statute which requires affidavits and copies of letters patent to be filed, than to establish regulations for the government of the sale and transfer of a peculiar species of intangible property, which, in its very nature, is so essentially different from other property that it must necessarily be transferred in a different manner. The regulations established by our Legislature are in the nature of police regulations; their purpose being to protect our people from being imposed upon by men who have either no authority to sell patent rights or no patent rights to sell. It has been directly decided by the Supreme Court of the United States, as well as by this court, that the National Congress can not make police regulations for the protection of the

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people of the States. *United States v. Dewitt*, 9 Wall. 41; *United States v. Reese*, 92 U. S. 214; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12 (48 Am. R. 692); *Brechbill v. Randall*, *supra*; *Hockett v. State*, *supra*.

As the Federal Legislature can not enact police regulations which will yield the citizens of the State just protection, it must be that the State Legislature may enact such regulations, or the citizens be left without protection. We are unwilling to declare that venders of patent rights can not be restrained by reasonable police regulations, and we do, therefore, declare, that the provisions of the statute under immediate mention, being in the nature of police regulations, are constitutional and valid.

The provision requiring the insertion of the clause, "given for a patent right," in promissory notes, we think, is also in the nature of a police regulation; but independent of this consideration, we regard that provision of the statute as valid, because it simply prescribes what shall be written in a promissory note given for a particular class of property. For more than half a century we have had statutes governing promissory notes, and making peculiar regulations concerning them, and during all those years their validity has remained unchallenged. To us it seems quite clear that such statutes are valid, and that the statute under discussion belongs to that class. This view of the subject finds strong support in the well reasoned case of *Tod v. Wick*, *supra*, where it was said; "The right to regulate the form and prescribe the effect of paper taken in commercial transactions has always been regarded as belonging to the States." In this view of the subject we concur, and our ultimate conclusion on this branch of the case is that the statute is valid in all its parts.

Where the assumed owner of personal property undertakes to transfer it in a method forbidden by statute, he can take no benefit from his illegal act. A patent right is property, and the States may regulate the method of its transfer, as they may any other property which is brought within its jurisdic-

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tion, provided, of course, no essential right in the property is taken away, and there is no encroachment upon the powers of the Federal Government. *Tod v. Wick, supra*; *Ames Iron Works v. Warren*, 76 Ind. 512 (40 Am. R. 258).

It is inconceivable that the vender of personal property, whether it be intangible property like a patent right or not, can acquire any rights from acts performed in direct violation of law, since enforceable legal rights only spring from transactions which violate no principle of law or equity. A legal right can not arise out of a wrong, so as to benefit the wrongdoer.

In our opinion a promissory note, executed in direct violation of a mandatory statute, is inoperative as between the parties and those who buy with notice. Where a statute, in imperative terms, forbids the performance of an act, no rights can be acquired by persons who violate the statute, nor by those who know that the act on which they ground their claim was done in violation of law. A promissory note, executed in a transaction forbidden by statute, is at least illegal as between the parties and those who have knowledge that the law was violated. It is an elementary rule that what the law prohibits, under a penalty, is illegal, and it can not, therefore, be the foundation of a right as between the immediate parties. *Wilson v. Joseph*, 107 Ind. 490; *Hedderich v. State*, 101 Ind. 571 (51 Am. R. 768); *Case v. Johnson*, 91 Ind. 477.

This rule also applies to those who assume to purchase from one of the parties to the transaction, but purchase with full knowledge that the law has been transgressed.

A man who assumes to transfer a right which the law forbids him from transferring, unless he does certain prescribed acts, can not yield a valid consideration to the person with whom he deals. Where one assumes to transfer what the law prohibits him from transferring, he parts with no rights which, as to him, at least, will constitute a sufficient consideration for another's promise. If the question were between

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the immediate parties, we should have no hesitation in declaring that, if the promissory note sued on was executed for a patent right, transferred in violation of the statute, there could be no recovery. Nor do we think there is any doubt that the rule should be applied where the holder of the note purchased with full knowledge of the character of the transaction.

The contention of the appellant, that the statute applies only to the sale of the patent right itself, and not to the sale of the right to use and to manufacture for sale and use the patented article, can not prevail. It is a sale of the patented right to sell the exclusive right to use and manufacture for sale and use the thing patented, for such a sale carries with it an interest in the patented right itself. Where the vender sells a right to use and to manufacture for sale and use during the existence of the patent, he parts with all substantial rights in the patent in the territory embraced in the assignment. Curtis Patents, section 181; Walker Patents, section 296.

Where it is evident that the intention of an instrument is to vest in the assignee the whole and exclusive interest in a patent right for a designated territory, no ingenuity in framing the instrument will carry the transaction beyond the reach of the statute. Schemes, however cunningly contrived, or subterfuges, however ingeniously devised, will not enable the vender of the patent right to evade the statute. Here, as elsewhere in jurisprudence, the inquiry which rules is, what was the substance of the transaction? and as that appears so will be the judgment of the court.

In the case before us, there was a grant of all the beneficial interest that the patentee possessed, and the case is, therefore, within the statute.

The answer avers that the appellant had knowledge of the consideration for which the note was executed, and we think she was bound to know that the note was inoperative unless the vender of the patent right had obeyed the law. She knew, as the answer avers, that the note was given for a patent

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right, and she was bound to know, as matter of law, that unless the vender had obeyed the law he could not yield a valid consideration to the maker of the note. On the face of the note it appeared that the statute had not been complied with, and this, joined to her knowledge of the consideration yielded for the note, gave her such notice as at least put her on inquiry. 1 Daniel Negotiable Inst., section 198. It became her duty, with the knowledge she possessed, to ascertain whether the vender had complied with the statute, for upon his compliance with the statute depended the validity of the note. If there was a violation of the law there could not be, as she must have known, any consideration for the promise of the purchaser of the patent right. The case is a peculiar one, for a statute so limits the powers of a vender of patent rights that he can not yield a consideration for a promise to pay for the assignment of a patent right, unless he has performed the duties imposed upon him. His right to secure a valid promise is restricted by the law, for, if he transgresses the law by making a transfer which it forbids, his contract is illegal, and can not constitute a valid consideration for the promise of the person with whom he deals. It seems very clear, therefore, that one who has knowledge of the consideration of the promise, and finds the note not such as the statute requires, should ascertain whether the acts essential to give the vender capacity to make a legal contract have been performed. There is a well defined and fully recognized distinction between promissory notes made illegal by statute, and those made inoperative between the immediate parties, because the consideration is one that the general rules of law condemn. It is, indeed, generally held that a promissory note expressly declared by statute to be void when given for a vicious consideration, is ineffective even in the hands of a *bona fide* holder. 1 Parsons Notes and Bills, 276 ; 1 Daniel Negotiable Inst., section 197. We do not hold, or mean to hold, that knowledge of the consideration of a promissory note will in ordinary cases put a purchaser upon inquiry ; on

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the contrary, we understand the law to be that in ordinary cases knowledge of the consideration, even when imparted by the note itself, will not prejudice the rights of a good-faith purchaser, unless the consideration is such as invalidates the note or is legally insufficient. *Hereth v. Merchants' Nat'l Bank*, 34 Ind. 380; *Doherty v. Perry*, 38 Ind. 15; *Bank of Commerce v. Barrett*, 38 Ga. 126; *Heard v. Dubuque Co. Bank*, 8 Neb. 10 (30 Am. R. 811); *Stevenson v. O'Neal*, 71 Ill. 314. Here, however, the purchaser of a note given for a patent right is chargeable with knowledge of the law if he knows the consideration for which the note was executed to be a patent right, for the statute, in express terms, prescribes who shall have authority to vend such rights, and the transfer by one who has no such authority, but who transgresses the law in making the transfer, is not a valid consideration for the promise contained in the note.

Where it appears, as it does in the answer before us, that the note was given for a patent right, that this fact was known to the purchaser of the note before its purchase, and that the clause required by the statute was not in the note, the burden is upon the holder of the note to show that his endorser took the note without notice as to the nature of the consideration. 1 Daniel Nego. Inst., section 198.

The transfer of a patent right could not, as we have said, be a valid consideration as against the original parties or those who bought with notice of the character of the consideration, and it is, therefore, incumbent upon one who buys with that notice to show, either compliance with the law, or that his endorser was, in all essential particulars, a good-faith purchaser of the note. We do not impugn the general doctrine that one who buys from a good-faith purchaser will secure a valid right although he may himself have notice of the infirmity in the consideration, for that we regard as well settled law; but we hold that where the person who buys a note not containing the words required by the statute, and knows that it was executed for a patent right, must, at least,

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affirmatively show that his endorser was a purchaser in good faith in all that the term implies. The case is closely analogous to those which hold that if a promissory note is obtained by fraud, it devolves upon the holder to prove that he was a purchaser in good faith. *Eichelberger v. Old Nat'l Bank*, 103 Ind. 401; *Mitchell v. Tomlinson*, 91 Ind. 167; *Baldwin v. Fagan*, 83 Ind. 447; *Hinkley v. Fourth Nat'l Bank*, 77 Ind. 475; *Zook v. Simonson*, 72 Ind. 83; *Hurbison v. Bank, etc.*, 28 Ind. 133.

The logical result of this reasoning is that the appellee's answer exhibits a complete defence to the appellant's cause of action.

The reply of the appellant alleges, in substance, that the note was purchased by George W. New before maturity; that he paid \$400 for it; that when he purchased the note he had no knowledge that it was given for a patent right; that at the time the appellant purchased the note from George W. New, she had no knowledge or information that it was executed for a patent right, and that she purchased the note before maturity and paid full value for it.

A material question involved in a consideration of the sufficiency of this reply is the character of the promissory note on which the complaint is based; but we think that there is no serious difficulty in solving this question, material as it is, for we have no doubt that it is a commercial note, negotiable by the law merchant. A note payable to bearer is negotiable as commercial paper, if, as does this one, it possesses the other essential requisites of such negotiable instruments. *Melton v. Gibson*, 97 Ind. 158; *Hall v. Allen*, 37 Ind. 541; *Riley v. Schawacker*, 50 Ind. 592; *Daniel Negotiable Inst.*, section 663.

Having determined that the promissory note, on which the action is founded, is negotiable as commercial paper, the next question is, what are the rights of the appellant as the *bona fide* holder of the paper? For there can be no doubt under the confessed allegations of the reply that she is such a holder.

She is such in the strongest light, for she purchased from a good-faith owner, and is herself free from fault and innocent of wrong. *Hereth v. Merchants' Nat'l Bank, supra*; *Newcome v. Dunham*, 27 Ind. 285.

The decisions agree, that, where the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so no matter into whose hands it may pass. The rule is thus stated by the court in *Vallett v. Parker*, 6 Wend. 615: "Wherever the statute declares notes void, they are and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure, or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of the consideration."

It is said by a late writer, in stating the same general rule, that, "when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it." 1 Daniel Negotiable Inst., section 197. We regard this author's statement as substantially expressing the general rule; and, accepting it as correct, the pivotal question is whether our statute does expressly, or by necessary implication, declare that notes given to venders of patent rights who have disobeyed the law shall be void? There is certainly no express declaration in the statute that such notes shall be void, nor do we think that there is any necessary implication that they shall be void. A man may be guilty of a misdemeanor, and yet notes taken by him in the transaction which creates his guilt may not be void in the hands of an innocent holder. A familiar illustration of this principle is afforded by those cases which declare that a note given in consideration of the suppression of a criminal prosecution is inoperative as between the immediate parties, but valid in the hands of a *bona fide* purchaser. This is the settled law, although the compounding of a felony is made a crime by statute. Our opinion is, that a statute making it a crime to take promissory notes in

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a prohibited transaction does not make the notes void in the hands of innocent purchasers, although the person who violates the statute commits a crime. This conclusion is well sustained by authority. *Anderson v. Etter*, 102 Ind. 115; *Vallett v. Parker*, *supra*; *Taylor v. Beck*, 3 Rand. (Va.) 316; *Glenn v. Farmer's Bank*, 70 N. C. 191; *Smith v. Columbus State Bank*, 9 Neb. 31; *Haskell v. Jones*, *supra*; *Palmer v. Minar*, 8 Hun, 342; *Cook v. Weirman*, 51 Iowa, 561.

A party who executes a promissory note, negotiable as commercial paper, fair on its face and complete in all its parts, puts in circulation an instrument which he knows is the subject of barter and sale in the commercial world, and it is his own fault if he does not put into it the words which will warn others not to buy it in the belief that it will be free from all defences. The experience of the business world has shown the necessity of affixing to promissory notes the quality of negotiability, and commercial transactions would be seriously disturbed if notes, fair on their face and containing the required words of negotiability, were not protected in the hands of innocent purchasers. It is, therefore, not the policy of the law to multiply exceptions to the general rules governing notes negotiable by the law merchant, so that in such a case as this it can not, without an indefensible departure from that policy, be held that the promissory note is not protected in the hands of a good-faith holder.

Nor can such a step be taken without wandering from the course marked and defined by the long established principle that, where one of two innocent persons must suffer from the act of a third person, he who puts it in the power of the third to do the act must bear the loss. To our minds it seems clear that this principle rules here, for the man who executes to a vender of patent rights a promissory note, in full and perfect form, puts it in his power to wrong others by selling the note as an article of commerce.

We regard the reply as unquestionably good, and adjudge that the trial court erred in sustaining the demurrer to it.

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It is contended by the appellee's counsel that as there is a special finding showing that the appellant was not a purchaser in good faith, no harm was done her in sustaining a demurrer to the reply. We can not concur in this view. The decision in *Sohn v. Cambern*, 106 Ind. 302, does not sustain the counsel's position. In that case there was no demurrer, but the attack was by the assignment of errors, and, besides, all that was said in that case, which is in any degree relevant to the present subject, was addressed to the provisions of section 345 of the code respecting the overruling,—not the sustaining,—of demurrers. It can not be legally possible that if a party's reply, presenting facts which completely avoid and nullify the answer of his adversary, is held to be insufficient, the special finding can cure the error. If his pleading is overthrown, he is not entitled to give evidence in support of the theory which it asserts, and he is, therefore, necessarily and materially injured by the ruling striking it down. Where a party duly excepts to a ruling on demurrer, which overthrows a valid pleading, he does not waive any rights by suffering the case to proceed to trial, nor is he bound to offer evidence upon the subject covered by his pleading, for his exception to the ruling on the demurrer effectually asserts and preserves his rights.

Judgment reversed.

Filed Dec. 7, 1886.

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No. 11,910.**BYARD v. HARKRIDER.**

PLEADING.—Complaint.—*When Specific Averment of Essential Fact Not Necessary.*—A complaint is not bad on demurrer for the want of a specific averment of an essential fact, where such fact is plainly apparent from other facts pleaded.

SAME.—Surplusage.—The averment of matter for which a recovery can not

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be had in the action as brought will not vitiate a complaint which states a good cause of action exclusive of such averment.

EVIDENCE.—*Objections to Admission of.*—*Practice.*—An objection to the admission of evidence, that it is "incompetent, immaterial and irrelevant," is too general to present any question.

ARBITRATION.—*Submission to Three Persons.*—*When Award by Two Invalid.*—Where, in a common law arbitration, under a written agreement, the submission of the matters in dispute is to three citizens, and there is no agreement that two may act and render an award, all three must meet, hear the proofs and sign the award, to render it valid.

From the Newton Circuit Court.

J. T. Brown, G. H. Stewart, D. E. Straight and U. Z. Wiley,
for appellant.

M. H. Walker, I. H. Phares and D. Fraser, for appellee.

Howk, J.—The first error of which complaint is here made by appellant, the defendant below, is thus assigned upon the record of this cause: "The court erred in overruling the demurrers to the first and second paragraphs of the complaint."

Appellee's complaint herein contained three paragraphs. Appellant's assignment of error, however, only calls in question the sufficiency of the first and second paragraphs of the complaint. There was no demurrer below to the third paragraph of complaint, nor is its sufficiency challenged here by any assignment of error.

In the first paragraph of his complaint appellee alleged that on the 18th day of March, 1882, appellant sold appellee a black stallion, for which he paid appellant the sum of \$500; that appellant falsely and fraudulently represented said horse to be a sure foal-getter, knowing the same not to be a sure foal-getter, and well knowing, at the time said representations were made, that said horse was utterly barren and incapable of getting colts; that appellee stood said horse for the year 1882, and advertised the same; that said horse was patronized extensively by the public, who put to him 94 mares, which mares were fruitful and were covered by said horse during the spring, summer and fall of 1882; that none of said mares

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became with foal by said horse ; that said horse was utterly barren and unprolific at the time of said sale, and utterly incapable of getting any mares with foal ; that appellee relied upon the statements and representations made by appellant, believing the same to be true ; that the defects and reasons why said horse was so unprolific and barren were of such a character that they could not be detected by a person of ordinary prudence and skill, exercising ordinary care ; that said horse was unsound, and for reasons unknown to appellee at the time of the sale, but well known to appellant, unprolific and barren ; and that appellee had no means, at or before the time of said purchase, of ascertaining that said horse was so unprolific, but that said facts were well known to appellant, who concealed the same from appellee. Wherefore, etc.

The only objection urged by appellant's counsel in argument, to the first paragraph of complaint, is, "that it does not allege that the horse was purchased for breeding purposes." It is true, that the paragraph does not contain any direct allegation to that effect ; but, taking all the facts stated therein together, we think the paragraph shows with certainty, sufficient to withstand appellant's demurrer thereto, that the horse was purchased by appellee for breeding purposes. Perhaps, if appellant had moved the court to have the paragraph made more specific on that point, it would have been error to have overruled such motion ; but there was no error in overruling his demurrer to the paragraph of complaint.

The second paragraph of complaint is founded on the same transaction, and states substantially the same facts as are set forth in the first paragraph, but in different order and phraseology, and with this additional averment : That said horse was entirely useless to appellee, and of no value whatever, and appellee had expended large sums of money and incurred great pecuniary loss in keeping and taking care of said horse, and in hiring help in and about feeding and taking care of said horse, all in the sum of \$1,000, for which he demanded judgment.

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In discussing the alleged error of the court, in overruling the demurrer to the second paragraph of complaint, the only point made by appellant's counsel is, that the appellee, in the additional averment above set out, seeks to recover expenses incurred in caring for and keeping the horse, and that such expenses can not be recovered, in an action against the seller of personal property for false representations, or on a breach of warranty. If this were conceded to be true, precisely as counsel have stated it, yet such additional averment would not vitiate the second paragraph of complaint, which states a good cause of action, exclusive of such averment, and, therefore, the demurrer to such second paragraph was correctly overruled.

Under the alleged error of the court, in overruling appellant's motion for a new trial, appellant's counsel first complain of certain alleged errors of law, occurring at the trial, in overruling their objections to a certain question propounded by appellee to different witnesses, and in permitting each witness to answer such question. This question was substantially as follows: What did appellant and appellee do and say, at the office in appellee's stable, when the notes were executed to appellant for the horse, in March, 1882? To this question, propounded, in substance, by appellee to a number of witnesses, appellant objected upon the general ground, in every instance, that the question was "incompetent, immaterial and irrelevant." Appellee's counsel earnestly insist that this objection to the question, propounded by him to the several witnesses, was correctly overruled for the reason that the objection was not sufficiently certain and specific, in its terms, to indicate to the trial court, or to this court, what were appellant's real grounds of objection to such question. The point thus made by appellee's counsel seems to be well made, and is supported by our previous decisions. *Stanley v. Sutherland*, 54 Ind. 339; *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91; *Forbing v. Weber*, 99 Ind.

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588; *Shafer v. Ferguson*, 103 Ind. 90; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409.

In the case last cited it is said: "So far as the statement of the objection urges that the testimony was incompetent and immaterial, it is not entitled to consideration on appeal, for the reason that it is not sufficiently specific. General objections of this character present no available questions."

It is further claimed on behalf of the appellant, that the verdict of the jury was not sustained by sufficient evidence, and that it was contrary to law, and that, for these causes, his motion for a new trial ought to have been sustained. Before considering these causes for a new trial, it is proper that we should state the issues in the case, which were submitted to the jury for trial. Appellant answered the appellee's complaint in two paragraphs, of which the first paragraph was a general denial of the material allegations of his complaint.

In the second paragraph of his answer, appellant alleged that, by virtue of a written agreement, a copy of which was filed with and made part of such paragraph, all the matters, controversies, differences and disputes, by and between appellee and appellant, in reference to the purchase and sale of a certain stallion, being the self-same matters and things that were stated in appellee's complaint herein, were submitted to a board of arbitrators jointly chosen by appellee and appellant; that said board of arbitrators heard all the evidence and arguments, in said submitted cause, and returned an award for appellant, a copy of which award was made a part of such paragraph of answer by being attached thereto; that subsequently to entering into such agreement of submission, and before the board of arbitrators met to hear said cause, it was agreed by and between appellee and appellant, that the award of a majority of said board should be final; and that appellant had complied with such award in all respects and particulars. Wherefore, etc.

To this second paragraph of answer appellee replied by a general denial.

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So far as the issue joined by the first paragraph of answer, in denial of the complaint, is concerned, the case rests upon conflicting evidence, and, of course, the verdict of the jury and the judgment of the trial court, under the established practice of this court, can not and will not be disturbed here on what might seem to be the preponderance of the evidence. This is settled by a long line of our decisions. *Rudolph v. Lane*, 57 Ind. 115; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Ketcham v. Barbour*, 102 Ind. 576; *Smith v. Smith*, 106 Ind. 43; *Allyn v. Allyn*, ante, p. 327.

It is claimed, however, by appellant's counsel, with apparent confidence, that, without conflict, the evidence fully sustains the material allegations of the second paragraph of appellant's answer. The arbitration and award, pleaded in this paragraph in bar of appellee's action, is a common-law arbitration and award. In such an arbitration, it is settled law that where, as here, the submission is to three citizens, and there is no agreement that two may act and render an award, all three of the arbitrators must meet, hear the proofs, and sign the award to render it valid. *Jeffersonville R. R. Co. v. Mounts*, 7 Ind. 669; *Baker v. Farmbrough*, 43 Ind. 240; *Morse Arbitration and Award*, pp. 151, 159 and 162.

The award pleaded by appellant in the second paragraph of his answer, in the case under consideration, was signed by two only of the arbitrators. It was to obviate this apparently fatal defect in such award, as we may suppose, that appellant alleged in his special answer that subsequently to entering into the agreement of submission, and before the arbitrators met to hear the cause, it was agreed between him and appellee, that the award of a majority of the arbitrators should be final. It was not claimed or shown by exhibit, or otherwise, that this subsequent agreement was in writing, as was the original submission, and the evidence in regard to it was sharply conflicting. In the absence of such an agreement, the award pleaded by appellant was absolutely null and void; and, by their verdict, the jury virtually and impliedly found,

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upon conflicting evidence, that no such agreement was ever entered into, by and between the parties. To such a case the invariable rule of practice, obtaining in this court, is clearly applicable, and forbids the reversal of the judgment below upon the evidence.

We have now considered and decided all the questions, discussed by appellant's counsel in their briefs of this cause, which are saved in and presented by the record, and we have found no error which authorizes or requires the reversal of the judgment.

The judgment is affirmed with costs.

Filed Dec. 7, 1886.

No. 12,685.

LYLES v. LESCHER ET AL.

DEED.—*To Heirs of Living Person.*—*Different Construction by Acts of Grantor.*—*Action for Possession.*—*Estoppel.*—The appellant, in 1871, by warranty deed, which he caused to be recorded, conveyed "to Anna Lyles and Isaac Lyles' heirs," the real estate which he now seeks to recover from a remote grantee of Anna Lyles, who conveyed it without objection by appellant, after the death of her husband. Isaac and Anna Lyles paid no consideration for the land, but were living on it when appellant executed the deed, and had children then living. There has been continuous possession by the Lyles and their immediate and remote grantees.

Held, that the deed executed by appellant is, on its face, a grant to the heirs of Anna and Isaac Lyles jointly.

Held, also, that the parties, by their acts, having placed such a construction upon it as to render it effectual as a conveyance, the grantor is estopped to assert title as against subsequent good-faith purchasers.

SAME.—The rule, that a deed to the heirs of a person in life is void for uncertainty, doubted. *Winslow v. Winslow*, 52 Ind. 8, criticised.

From the Gibson Circuit Court.

J. E. McCullough and *J. H. Miller*, for appellant.

M. W. Fields and *J. W. Ewing*, for appellees.

ELLIOTT, C. J.—In July, 1871, Joshua Lyles and his wife

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121	383
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164	570

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executed a deed which, omitting the formal parts, reads thus: "This indenture witnesseth that Joshua Lyles and Copatrick Lyles, his wife, of Gibson county, in the State of Indiana, convey and warrant to Anna Lyles and Isaac Lyles' heirs, of Gibson county, in the State of Indiana, for the sum of four hundred dollars, the following real estate in Gibson county, Indiana, to wit: The west half of the west half of the southwest quarter of section number twenty-five, in township number one south, of range twelve west."

Isaac Lyles was the son of the grantors, and Anna was Isaac's wife. After the execution of the deed, the grantor himself caused it to be recorded, by delivering it to the recorder, on the day of its execution, for record. Both Isaac and Anna Lyles were living on the land at the time the deed was executed, and had three children then living. No consideration was paid to the grantors for the conveyance, but possession was held by the grantees. Isaac Lyles died in 1876, and after his death his widow, Anna Lyles, conveyed the real estate to John J. Lescher, who devised it to his wife, Eliza J. Lescher, and died in March, 1878. Eliza J. Lescher continued in possession of the land after the death of her husband until October, 1882, when she conveyed the land to William Lescher and put him in possession, and he has since remained in possession, in conjunction with Jesse Lescher, to whom he conveyed an interest in the land.

The facts, which we have given in an abridged form, are stated in a special finding, and upon them this conclusion of law was stated by the court: "The plaintiff has no title to the land."

One of the controlling questions in the case is as to the effect of the deed of July 1st, 1871, upon the appellant's claim to the land, for, if it divested him of all title, it is not material to inquire what is the character of the estate vested in his grantees. If the appellant has no title his action to recover the land was justly defeated.

The contention of appellant's counsel is, that as no grantee

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is named the deed is void. We concur with them that where no grantee is named, or when the one named is not in being, the deed is not valid. *Harriman v. Southam*, 16 Ind. 190. It has also been held that a deed to the heirs of a person in life is void for uncertainty, for the reason that no one can have heirs during his lifetime. *Hall v. Leonard*, 1 Pick. 27; 3 Washburn R. P. (5th ed.) 567.

Our own court has, upon the concession of counsel, assumed this to be the rule, although, as it is evident, without very careful examination, for the case of *Morris v. Stephens*, 46 Pa. St. 200, relied on, has been overthrown, and the case of *Hunter v. Watson*, 12 Cal. 363, cited by Washburn, is not in point, because, when the deed in that case was made, the grantee named was dead, and it was held that a deed to a dead man was a nullity. *Winslow v. Winslow*, 52 Ind. 8.

In speaking of the case of *Morris v. Stephens*, *supra*, in a subsequent case, the court said: "The reliance of the court below and of this court on the former occasion, was upon the case of *Hall v. Leonard*, 1 Pick. 27, a case which in its turn was rested upon what is laid down in Perkins, section 52, that a grant to the heirs of a person in being is void, as there are no persons *in esse* who can take under that description. If the learned judge of the Supreme Court of Massachusetts had noticed that this rule from Perkins was predicated of incorporeal interests, which only lie in grant and are not susceptible of livery, he would not have misled us into applying it to a conveyance of land here in Pennsylvania, where registry stands instead of livery." *Huss v. Stephens*, 51 Pa. St. 282.

The case from which we have quoted was expressly and very emphatically approved in *Stephens v. Huss*, 54 Pa. St. 20.

It was held in *Hogan v. Page*, 2 Wall. 605, that an instrument of conveyance, called a confirmation, which granted land to the "representatives of Auguste Conde," was valid.

It, therefore, seems doubtful whether the law is as the appellant assumes it to be and as it is conceded to be by the ap-

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pellees, but we will not now attempt to decide that question, and shall assume, without so deciding, that the law is what counsel agree that it is.

Appellees' counsel, assuming that if the deed is to the heirs of Anna and Isaac Lyles jointly, it is void, contend that this is not a just construction, but that the proper construction is that it is a grant to Anna Lyles, and to the heirs of Isaac Lyles. This contention can not prevail. The deed on its face purports to be, and is, *prima facie*, a grant to the heirs of Anna Lyles and Isaac Lyles jointly. No other construction can be placed upon it, looking alone to the words employed, without directly violating the plain and well known rules of grammar. To make the deed properly and fully express what the appellees claim, would require us to supply a punctuation mark and an additional word. This we can not do, on the basis furnished by the language of the deed alone.

The remaining inquiry is, whether the acts of the parties gave such a construction to the deed as should protect the title in the hands of *bona fide* purchasers. It appears that possession was held by Anna and Isaac Lyles during the life of the latter; that after his death it was held by Anna, and thenceforth by her immediate and remote grantees. It appears, also, that the grantor himself caused the deed to be placed on record. These acts, in our judgment, gave a construction to the deed which makes it effectual as a conveyance. As we have said, a change in the punctuation, by adding a single mark, and one word would make the deed mean exactly what the acts of the parties have construed it to mean, that is, that it divested the appellant of title, and we think their construction, as evidenced by their conduct, should prevail, at least as against intervening third parties.

It is said to be "a rule in reading and construing deeds, that no regard is had to punctuation, since no estate ought to depend upon the insertion or omission of a comma or semicolon."

3 Washb. Real Prop., p. 628. It is also a familiar doctrine,

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that, where the acts of the parties have placed a construction upon a contract, the courts will give effect to the contract as the parties have construed it. *Johnson v. Gibson*, 78 Ind. 282, and authorities cited p. 284; *Reissner v. Oxley*, 80 Ind. 580; *Willcuts v. Northwestern M. L. Ins. Co.*, 81 Ind. 300, see p. 311; *Æna Life Ins. Co. v. Nexsen*, 84 Ind. 347 (43 Am. R. 91); *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7; *Vinton v. Baldwin*, 95 Ind. 433; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, see p. 212 (51 Am. R. 749).

In holding that the acts of the parties performed under a written contract are admissible for the purpose of ascertaining the construction placed upon it, there is no encroachment upon the rule that contemporaneous parol evidence is not admissible to vary a written instrument, for acts done in execution of the contract are subsequent in time to the execution of the instrument, and different from mere verbal statements. In this instance, the acts of the appellant in causing the deed to be placed of record, in suffering possession to be maintained under the deed, and in permitting the land to be sold by the grantee as an owner, are utterly incompatible with the claim now asserted, and are invincibly hostile to the theory now advocated. After all these acts, and after the lapse of so many years, he can not, in justice, be permitted to affirm that the deed did not mean what his acts have so unequivocally asserted that it did mean.

Mr. Broom, translating a fundamental maxim, says: "A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties." Broom Max., star p. 540. Another author says: "The law, fortunately, is far from being strict in requiring any great accuracy or precision in respect to what is written, so far as the rules of grammar or orthography are concerned." 3 Washb. Real Prop. 554. By another writer it is said: "Where a deed can not operate in the way intended by the parties, it will be construed so as to operate in some

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other way if possible." 2 Greenl. Cruise Real Prop. 601, section 33.

Here, a little, insignificant change, nothing more, perhaps, than the rejection of the sign of the possessive case, would make this deed operate as the grantor, by his acts, certainly declared it should operate, and we ought not to sacrifice the substantial rights of purchasers to so small a matter. If we should do so, we would make the deed inoperative, defeat the rights of intervening purchasers, and disregard the acts of the grantor; but, in upholding the deed, we do him no injustice, for it is evident that he meant to divest himself of title, and we do no more than carry that intention, so plainly manifested by his acts, into effect, and give protection to rights acquired on the faith of his deed and his acts.

Judgment affirmed.

Filed Dec. 8, 1886.

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No. 13,087.

FAHLOR v. THE STATE.

BILL OF EXCEPTIONS.—*Manuscript of Short-Hand Reporter.*—The long-hand manuscript of the evidence, taken by a short-hand reporter, can only be certified to the Supreme Court, as a part of the record, when it has been incorporated in a bill of exceptions.

From the Wells Circuit Court.

C. M. France and *M. W. Lee*, for appellant.

L. T. Michener, Attorney General, and *W. B. Hord*, for the State.

Howk, J.—In this case the appellant was indicted, tried and convicted, in the court below, for unlawfully permitting a minor to play a game of pool on a pool-table, owned by such appellant. From the judgment of conviction, he has appealed to this court, and the only error, of which he here complains, is the overruling of his motion for a new trial.

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In this motion, the only causes assigned for such new trial were, (1) that the verdict of the jury was contrary to law, (2) that it was contrary to the evidence, and (3) that it was not sustained by the evidence.

Manifestly, no question is presented for our decision by the record of this cause and the error assigned thereon, if the counsel for the State are right in claiming, as they do, that the evidence on the trial was not made a part of such record in any manner known to our law.

There appears in the transcript of the record, now before us, what we may suppose to be the long-hand manuscript of the evidence in the cause, taken in short-hand by the official reporter of the trial court. In section 1410, R. S. 1881, it is provided that the clerk of the trial court, "in case of an appeal to the Supreme Court," may certify the original long-hand manuscript of the evidence, "when the same shall have been incorporated in a bill of exceptions, to the Supreme Court, * * * instead of a transcript thereof." In construing this section of the statute, which has been in force since March 10th, 1875, it has always been held by this court, that the long-hand manuscript of the evidence, taken by a shorthand reporter, can only be certified to this court, as a part of the record, "when the same shall have been incorporated in a bill of exceptions." *Galvin v. State, ex rel.*, 56 Ind. 51; *Woollen v. Wishmier*, 70 Ind. 108; *Lowery v. Carver*, 104 Ind. 447.

In the case in hand, the long-hand manuscript of the evidence was not incorporated, nor was there any apparent attempt, even, to incorporate such manuscript in any bill of exceptions appearing in the record. Clearly, therefore, we can neither consider nor decide the questions discussed by appellant's counsel. *Wagoner v. Wilson, ante*, p. 210.

The error complained of is not shown by the record.

The judgment is affirmed, with costs.

Filed Dec. 8, 1886.

Sutherlin v. The State.

No. 13,134.

SUTHERLIN v. THE STATE.

CRIMINAL LAW.—Continuance.—Affidavit.—Attaching Previous Affidavit to Application.—An affidavit for a continuance must set out all the facts, as they exist at the time, essential to support the application. It is not sufficient to attach to the affidavit presented an affidavit filed at a preceding term, and refer to the facts therein stated.

SAME.—Continuance to Take Deposition.—Application for Second Continuance.—Where a cause is continued that the defendant may take the deposition of an absent witness, an application for another continuance at a subsequent term to procure the testimony of such witness, which states no reason for failing to take the deposition, is bad.

SAME.—New Trial.—Newly Discovered Evidence.—Cumulative and Impeaching.—Newly discovered evidence of a merely cumulative character, or which tends only to the impeachment of a witness without rendering a different result of the trial probable, is not sufficient ground for a new trial.

SAME.—Instructions.—Practice.—Where it is assigned as cause for a new trial that the court erred in giving or refusing instructions, the particular instructions upon which error is predicated must be specified with reasonable certainty.

From the Parke Circuit Court.

V. Carter, S. D. Puett and H. E. Hadley, for appellant.

F. T. Hord, Attorney General, and W. B. Hord, for the State.

MITCHELL, J.—The appellant was tried and found guilty upon an indictment, charging him with the crime of grand larceny. His punishment was fixed at imprisonment in the State prison for the period of three years.

The indictment was returned to the May term, 1885, of the Parke Circuit Court. On motion of the prosecuting attorney, the cause was continued to the September term. On the 5th day of September, at the appellant's request, the cause was again continued over the term. The appellant's motion for a continuance was supported by an affidavit, in which he deposed, that certain competent witnesses, who would, if present at the trial, give material evidence in his behalf, were absent from the State. The affidavit recited,

108	389
129	588
108	389
134	114
108	389
143	688
108	389
144	303

108	389
151	679
108	389
163	301

108	389
170	632
170	654

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in substance, the evidence which it was alleged the absent witnesses would give, and was apparently formal in all respects. An order was duly made authorizing the appellant to take depositions out of the State.

At the ensuing November term, after an unsuccessful application for a change of venue from the county, the appellant again moved for a continuance. His motion was supported by an affidavit in which he alleged that one of the same witnesses, whose absence occasioned the continuance at the September term, was still absent, and that he had been unable to procure the deposition of the witness referred to.

This last affidavit contained no statement of the facts which it was expected the witness would testify to, nor that such facts could not be proved by any other witness whose testimony could be readily procured. All that the affidavit contained in respect to these subjects was the following: "Comes now the defendant, who being duly sworn says, that the witness, John Porter,—referred to in his affidavit hereto attached, and made part hereof, which was made at the last court, as to what said Porter would swear to, and which by agreement is made a part hereof,—is as he now learns for the first time," etc. "That the evidence of said Porter is very material as the court will see by the affidavit hereto attached."

While the record sets out, at the appropriate place, the affidavit filed in support of appellant's first application for a continuance, it in no manner,—except by the recitals above set out,—shows that the affidavit referred to was made a part of that filed in support of the second application. Conceding that the first affidavit was attached to the second, as therein recited, the continuance was nevertheless properly denied.

The material facts which the statute requires to be set forth in an affidavit for a continuance, can not be supplied by merely attaching to the one presented an old affidavit, however formal, which has served its purpose at a previous term. The affidavit must set out and verify all the facts, as they then exist, which are essential to support the application.

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The case having been once continued at the appellant's request, in order to procure the testimony of Porter, and no sufficient reason appearing for the failure to take depositions during the vacation, the last continuance applied for, in the manner above stated, was properly refused.

It is next urged that the court erred in refusing to grant a new trial on account of alleged newly discovered evidence.

During the progress of the trial one Lawson, apparently a confederate of the appellant in the alleged larceny, was called to testify on behalf of the State. The testimony of Lawson related almost exclusively to criminating admissions made by the appellant to the witness, tending to prove the larceny charged.

By the newly discovered witnesses, on account of whose evidence the new trial was asked, it was proposed to prove that Lawson had made statements out of court, variant from, and contradictory of, those testified to by him at the trial.

An examination of the record discloses that most of the evidence introduced by the defence was of the same character as that alleged to have been newly discovered.

Within the rule that newly discovered evidence of a merely cumulative character, or which tends only to the impeachment of a witness, without rendering a different result from that already reached probable, affords no sufficient ground for a new trial, the application was properly denied. *DeHart v. Ager*, 107 Ind. 460.

The case here presented is not within the rule which governed the cases relied on by the appellant: *Kochel v. Bartlett*, 88 Ind. 237; *Rains v. Ballow*, 54 Ind. 79; *Humphreys v. Klick*, 49 Ind. 189.

Those were cases in which it was proposed, by newly discovered evidence, to prove verbal admissions of a fact, made by the adverse party, in a manner substantially different from any proof offered of the same fact at the trial. The rule which controlled the cases referred to has no application here.

The only other question presented for consideration in the

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argument relates to alleged errors of law in the eleventh and fifth instructions given by the court of its own motion.

The only specification in the motion for a new trial, which calls in question the instructions of the court, is the sixth, which is as follows:

“That the court erred in giving instructions from 1 to —, inclusive, of its own motion, to the jury, and in giving each of said instructions.”

It has been repeatedly held that a motion for a new trial, which assigns as a cause therefor, that the court committed error in giving or refusing instructions, must specify with reasonable certainty the particular instruction upon which error is predicated. *Grant v. Westfall*, 57 Ind. 121.

The statement of the rule renders comment on the specification above set out unnecessary.

The judgment is affirmed, with costs.

Filed Dec. 8, 1886.

108	309
120	122
108	302
144	381

No. 13,371.

THE CITIZENS INSURANCE COMPANY v. HARRIS.

BILL OF EXCEPTIONS.—*Agreed Statement of Facts.*—An agreed statement of facts, in a case not an agreed one under the statute, is mere evidence, which must be brought into the record by a bill of exceptions, and unless it is shown that the bill contains all the evidence, no question which requires a consideration of the entire evidence is presented on appeal.

From the Marion Superior Court.

D. M. Bradbury, for appellant.

D. V. Burns, for appellee.

ELLIOTT, C. J.—No demurrer was filed to the appellee's complaint at the special term, and the specification in the as-

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signment of errors, that the court erred in overruling the demurrer to the complaint, has no foundation.

The case is not within the statute concerning agreed cases, for it is an ordinary action at law with an agreement as to the facts. There is an essential difference between an agreed case and a case where the trial takes place upon an agreed statement of facts. *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471, see p. 477 and authorities cited; *Zeller v. City of Crawfordsville*, 90 Ind. 262; *Pennsylvania Co. v. Niblack*, 99 Ind. 149.

The agreement as to the facts in a case not an agreed one under the statute, is mere evidence and nothing more. A recital in the agreement that the facts are embodied in it is not, as was said in *Martin v. Martin*, 74 Ind. 207, a substitute for the bill of exceptions; whereas, in an agreed case under the statute, neither pleadings nor bills of exception are required. Here, the agreement as to the facts is but an agreement as to what the evidence would establish, and it is only in the record by force of the bill of exceptions. But, while the agreement as to the facts is in the record, there is no statement in the bill showing that it contains all the evidence, and as there can be no decision of the questions presented without a consideration of all the evidence, it must be held that the appeal fails. It has long been the rule that, unless the record affirmatively shows that all the evidence is in the bill of exceptions, no question requiring a consideration of the entire evidence is presented.

Judgment affirmed.

Filed Dec. 9, 1886.

 Childress, Administratrix, v. Callender *et al.*

No. 12,684.

CHILDRESS, ADMINISTRATRIX, v. CALLENDER ET AL.

INSTRUCTIONS TO JURY.—*Memorandum of Exception to.*—*Signing by Judge.*—*Filing.*—Under sections 533 and 535, R. S. 1881, to make instructions given or refused a part of the record, the words “given and excepted to,” or “refused and excepted to,” must be written on the margin or at the close of each instruction, which memorandum must be signed by the judge, and dated, and the instructions filed.

From the Knox Circuit Court.

O. F. Baker, E. B. Green and J. S. Pritchett, for appellant.
G. G. Reily and W. C. Niblack, for appellees.

Howk, J.—In their brief of this cause, appellant’s counsel say: “This cause is here, purely, upon the instructions given and refused. It is conceded by appellant, as a matter of law, that if the instructions complained of are right, under any conceivable state of evidence, her error assigned is not available; and, as a matter of fact, that the evidence fully warranted each instruction, if it correctly states the law. She claims that the state of evidence, upon which these instructions were predicated, did as a matter of law demand that the instructions, asked by her and refused by the court, should have been given.”

The point is made by appellees’ counsel, however, and seems to be well made, that neither the instructions given, nor those asked for by appellant and refused by the court, were made parts of the record of this cause in such manner as that they can be considered here, or in any mode known to our law. They were not made a part of the record either by a bill of exceptions, or by an order of court. In section 535, R. S. 1881, which supersedes and takes the place of section 325 of the civil code of 1852, it is provided as follows: “A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write on the margin, or at the close of each instruction, ‘refused, and excepted

108	394
145	164

108	394
152	604

108	394
154	177
156	325

108	394
164	438

108	394
165	242

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to,' or 'given, and excepted to'; which memorandum shall be signed by the judge, and dated."

We have said that the section quoted superseded and took the place of section 325 of our first civil code. The latter section provided an exceptional mode for making the instructions of the trial court a part of the record, on an appeal to this court, without embodying such instructions, as our practice had previously required, in a "formal bill of exceptions." By that section, "the party or his attorney" could make the instructions a part of the record, of his own motion and without the action or sanction of the court or judge, by writing on the margin or at the close of each instruction "refused and excepted to," or "given and excepted to," and by signing such memorandum. So the law remained from the 6th day of May, 1853, without amendment or repeal, until the taking effect of section 535, above quoted, on the 19th day of September, 1881, or for more than twenty-eight years. During those years, the provisions of the old section were often the subject here of comment and construction; and it was uniformly held that, where it was sought to make instructions a part of the record in the mode prescribed in that section, and without a formal bill of exceptions, the requirements of the statute must be strictly complied with. *Manhattan Life Ins. Co. v. Doll*, 80 Ind. 113; *O'Donald v. Constant*, 82 Ind. 212; *McCammack v. McCammack*, 86 Ind. 387.

Section 535, above quoted, which has been in force since September 19th, 1881, is a literal re-enactment of section 325 of our first civil code, except in this, that "the party or his attorney" is no longer authorized to make the instructions, given or refused, a part of the record on an appeal to this court, by signing the statutory memorandum therein mentioned, but it is now provided in such section 535, that such "memorandum shall be signed by the judge, and dated." The adoption and taking effect of such section 535 was, of course, a virtual repeal of so much of section 325 of the old civil code

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as was not re-enacted in the later section, and effected a radical and, we think, a wise change in our civil practice. Thereafter the memorandum, mentioned in such section, was to be "signed by the judge, and dated;" and where, as in this case, such memorandum was signed by the attorneys of the party excepting, and not by the judge, it is very clear that the instructions were not thereby made a part of the record on an appeal to this court. At the close of each instruction given by the court, in the case under consideration, there appears the statutory memorandum "given and excepted to," which is not signed by the judge, and is without date, but, in each instance, it was signed by appellant's attorneys. It needs no argument, we think, to show that the signature of the party or his attorney to the statutory memorandum will no longer operate to make the instruction excepted to a part of the record, but that, to that end, such memorandum must now "be signed by the judge, and dated." In *Behymer v. State*, 95 Ind. 140, after citing section 535, above quoted, it is well said: "Under this section, the date is quite as material as the signature of the judge, *first*, because they are both required by the statute; and, *second*, because it is the date that shows when the exception was taken. It takes the place of the statement in a bill of exceptions, that the exception was taken at the time."

The instruction asked by appellant, and refused by the court, although the memorandum, "refused and excepted to," at the close of such instruction, appears to have been "signed by the judge, and dated," is not properly a part of the record of this cause, and can not be considered here. In section 533, R. S. 1881, which is substantially a re-enactment of section 324 of the civil code of 1852, it is provided as follows: "All instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record." In construing this statutory provision, it has been uniformly held, that, in order to save any question for our decision in reference to the giving or refusal

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of instructions, it must be shown, in some manner, that such instructions were filed "as a part of the record." *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110; *O'Donald v. Constant, supra*; *Elliott v. Russell*, 92 Ind. 526; *Olds v. Deckman*, 98 Ind. 162; *Landwerlen v. Wheeler*, 106 Ind. 523.

In the case in hand the record fails to show by any memorandum, recital or file-mark, that any instructions, either those given or those asked for and refused, were ever filed in the court below. It follows, therefore, that the errors of the trial court, of which appellant's counsel complain, are not so saved in the record of this cause as to present any question for our decision.

The judgment is affirmed, with costs.

Filed Dec. 8, 1886.

 No. 12,733.

BRUNER v. PALMER.

PARTITION FENCE.—*Agreement of Adjoining Owners to Maintain Distinct Portions.*—*Assessment of Damages.*—*Statute Construed.*—Under section 4848, R. S. 1881, it is competent for adjoining land-owners to agree that, instead of both maintaining the whole of the partition fence jointly, each shall maintain a distinct portion thereof, and in either event the statutory method for the assessment of damages against the party in default is applicable.

SAME.—*Notice.*—*Sufficiency of.*—A written notice to the owner in default that on a day and at an hour named the other owner will call upon two disinterested freeholders "to examine all of the partition fences between my land and your land in Daviess county, in the State of Indiana," and assess the amount necessary to make them sufficient, if they are deemed insufficient, is good under the statute.

SAME.—*Evidence.*—*Assessment Admissible Though Not Signed.*—*Identification.*—The assessment made by the appraisers in such case, although not signed, is admissible in evidence after it has been properly identified.

From the Daviess Circuit Court.

108	397
163	119

Bruner v. Palmer.

J. C. Billheimer and J. Downey, for appellant.

J. Baker, for appellee.

MITCHELL, J.—Josiah C. Palmer and Richard Bruner, being adjoining land-owners, agreed that each should maintain and keep in repair certain specified portions of a partition fence on the line dividing their lands.

Palmer charged in a complaint filed against Bruner, that while he faithfully performed his part of the agreement, the latter wholly failed, neglected, and refused to maintain in repair that part of the fence allotted to him, under the agreement, but permitted it to go into decay, so that it became insufficient to protect the crops of each from invasion by the animals of the other.

The complaint averred that the plaintiff thereupon caused notice to be served upon the defendant, to the effect that at a specified hour, on a day named,—more than three days from the date of such notice,—he would call upon two disinterested freeholders to examine the fence, and, if found insufficient, assess the amount required to make it sufficient.

It is charged further, that at the time fixed an examination and assessment were made by the persons selected, who assessed the amount required at \$84.02, and that the defendant failing for more than fifteen days thereafter to make the required repairs, the plaintiff made them at a cost of \$84.

The appellant predicates error on the ruling of the court in overruling a demurrer to this paragraph of the complaint.

The argument is, that because the parties agreed, as appears from the complaint, that each should keep in repair the whole of certain portions of the fence, the statutory remedy, which the plaintiff below sought the benefit of, was not available. In such a case, it is said the only remedy for the party aggrieved is by an action for damages for a violation of the agreement. This result is said to follow from a proper construction of the last clause of section 4848, R. S. 1881, which reads as follows: "Except when otherwise

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specially agreed, partition fences dividing lands, occupied on both sides, shall be maintained, throughout the year, equally by both parties."

An examination of this statute leads us to a different conclusion. In the absence of an agreement by the adjoining proprietors concerning the character of the fence, or in respect to the particular part thereof to be maintained by each, the statute requires that a lawful partition fence shall be maintained throughout the year by both. In such a case, each would be required to contribute a just proportion to the maintenance of the whole. Either may repair the whole if the other refuses as to his proportion, and enforce contribution for the share of the other by the statutory method. The statute, however, permits the parties interested to agree upon certain modifications, as to the character of the fence, as that it shall only be sufficient to restrain horses, mules or cattle. By clear implication, they may also agree, that instead of both maintaining the whole fence jointly, each shall maintain the whole of such portion as may be agreed upon, separately. In either event, the statutory method for the assessment of damages against the party in default is applicable.

That one land-owner, who sustained damage by the failure of the other to perform an agreement of the character of that in question, might maintain a common law action for damages resulting from the violation of the agreement, may be conceded. It does not follow that the statutory method of ascertaining the amount required to make the fence sufficient, may not also be resorted to, in a proper case.

In respect to so much of the argument on appellant's behalf as seeks to demonstrate that the verdict is contrary to the evidence, and that it is contrary to law, waiving the point that the objections are too general to require notice, all that need be said is that an examination of the record discloses an abundance of evidence, properly admitted, which, if believed by the jury, sustains the verdict of \$65 in favor of the plain-

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tiff below, and shows that it is neither contrary to the evidence nor to the law.

The notice which was admitted in evidence informed the defendant below, that on a day, and at an hour named, the plaintiff would call upon two disinterested freeholders "to examine all of the partition fences between my land and your land, in Daviess county, in the State of Indiana, and assess the amount that may be required to make said fences sufficient and lawful fences, if they are deemed insufficient."

The objection made to the notice is, that it does not state with sufficient certainty where the freeholders are to meet, and that it does not describe with sufficient definiteness the fence to be repaired or rebuilt.

The purpose of the statute, as it seems to us, was to furnish a method free from unnecessary technicality, and readily available to the use of persons for whose benefit it was designed, by which to convey notice of the insufficient condition of a partition fence, and of the intention of the party giving the notice to proceed to ascertain the cost of putting the fence in repair, in the event the person notified should fail to make the repairs within fifteen days.

The notice was sufficiently definite for all the purposes for which it was intended.

The persons called upon to examine the fence and assess the amount required to make it sufficient, made an informal but detailed statement in writing, showing the number and cost of rails required, and the value of labor necessary to put the defendant's part of the fence in repair.

This paper was identified as the assessment made by the appraisers, and admitted in evidence. It was not signed, and it is now claimed that its admission was on that account improper.

The assessment is in a sense the foundation of the action. It affords *prima facie* the basis of the plaintiff's recovery. Unless, therefore, the fact that the assessment, under consid-

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eration, was not signed, rendered it incompetent, it was properly admitted in evidence.

The statute does not, in terms, require that the assessment should be signed, and considering that the proceeding was manifestly intended to be applied by plain men, without professional aid, technical objections are not to be favored. The statute was satisfied by proof that the paper in question contained the actual assessment made by the appraisers, and as it contained an intelligent statement of the assessment made, no rule of evidence was violated by admitting the paper in evidence after it was so proved. *Saunders v. Heaton*, 12 Ind. 20.

The judgment is affirmed, with costs.

Filed Dec. 9, 1886.

No. 12,803.

PIPHER ET AL. v. JOHNSON ET AL.

REPLEVIN.—*Bond.—Stranger Can Not Maintain Action on.*—An action can not be maintained upon a replevin bond by a person who was not a party to the replevin proceeding nor an obligee in the bond.

From the Daviess Circuit Court.

W. R. Gardiner and S. H. Taylor, for appellants.

ZOLLARS, J.—On the same day, in November, 1880, N. B. Shaw and John Abels recovered separate judgments, aggregating about \$600, against the Nelson Iron and Coal Company. On the 18th day of that month, executions were issued upon those judgments, and the sheriff levied them upon, and took into his possession, personal property, of the value of about \$5,000, as the property of the iron and coal company. Shortly thereafter, claiming the property as theirs,

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the appellees herein, Fordyce, Johnson and Plummer, as plaintiffs, replevied the property from the sheriff, Pipher, making defendants to the action with him the judgment creditors, Shaw and Abels, and got possession of the property by executing a replevin bond, which, after setting out the title of the cause, with the names of the plaintiffs and defendants in full, was as follows:

"We undertake that the plaintiffs in the above entitled action shall prosecute said action with effect and without delay, and return the property in controversy to the defendants herein, if return be adjudged by the court, and pay to said defendants all such sums of money as they may recover against the plaintiffs in this action for any cause whatever."

This bond was signed by the plaintiffs in the action, and by appellee Frank Baker, who was surety for the other obligors.

While the replevin suit was pending, and while the property was thus in the possession of Fordyce, Johnson and Plummer, Frick, Ferguson and Ferguson, appellants herein, recovered a judgment against the iron and coal company in the sum of \$2,070. In January, 1881, an execution was issued upon that judgment, and by the sheriff levied upon the said personal property still in the possession of Fordyce, Johnson and Plummer.

Upon an appeal to this court, it was held that the levy of the executions in favor of Shaw and Abels, and the taking possession of the property by the sheriff, brought it within the custody of the law; that the possession of Fordyce, Johnson and Plummer, secured to them by the undertaking given in the replevin proceedings, was, in legal contemplation, that of the law, and that being thus *in custodia legis*, the property could not be seized under the execution upon the judgment in favor of appellants. *Pipher v. Fordyce*, 88 Ind. 436.

While the replevin suit was pending, and before its termination, and while the execution upon appellants' judg-

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ment was in the hands of the sheriff, Fordyce, Johnson and Plummer shipped the property out of the State, sold it, and realized therefrom \$5,000. Afterwards, Fordyce purchased from Shaw and Abels their judgments against the coal and iron company, as alleged in appellants' complaint herein, to prevent a trial of the replevin suit, and at the time of making the purchase, he, Shaw, and Abels agreed that judgment should be rendered in that suit in favor of the plaintiffs therein at their costs, reserving to the sheriff, and appellants, all rights that they or either of them might have by virtue of appellants' judgment, the execution thereon, or under the bond in the replevin suit, or by reason of the sale of the property by Fordyce, Johnson and Plummer. Upon that agreement, judgment was accordingly rendered.

During all this time, the coal and iron company has had no other property, out of which appellants could make any part of their judgment.

In this action, appellants seek to avail themselves of the bond executed in the replevin suit, and to recover thereon against Fordyce, Johnson and Plummer, and their surety, Baker, the amount of their judgment against the coal and iron company.

The foregoing is substantially the statement of facts as contained in appellant's complaint. It is further alleged therein, that the property in question belonged to the coal and iron company, and not to appellees, Fordyce, Johnson and Plummer.

It will be noticed that there are three conditions in the replevin bond:

- 1st. To prosecute the suit with effect, and without delay.
- 2d. To return the property to the defendants in the action, upon a judgment of return by the court.
- 3d. To pay to the defendants in the action such sums of money as they might recover against the plaintiffs in the action.

For the performance of these conditions, and none other,

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the principals in the bond, and their surety, bound themselves by the undertaking. It is clear, that the defendants in the replevin suit, who were the obligees in the bond, could not have maintained an action on the bond, either for the value of the property or for damages, because no condition of the bond was broken by the obligors. They are not in fault for not having returned the property, because there was no judgment for its return. They are not in fault for not having paid to the obligees any sum of money, because there was no judgment against them except for costs, and for aught that appears they are paid. They are not in fault for not having prosecuted the action, because, by the agreement of all parties to the action, it was settled, and judgment rendered in their favor. *Gerard v. Dill*, 96 Ind. 101; *Thomas v. Irwin*, 90 Ind. 557; *Foster v. Bringham*, 99 Ind. 505.

We know of no principle of law that will enable appellants, who were not parties to the replevin suit, and, hence, not obligees in the bond, to recover upon that bond. The undertaking was to and with the defendants in the replevin suit, and to and with no one else. To hold the principals in the bond liable thereon to appellants, would be to hold them liable to a party, upon a contract, with whom they had no contract. This certainly can not be done. And still less can the surety be held beyond the terms of his undertaking.

If appellants have been in any way wronged by the acts of Fordyce, Johnson and Plummer, and have any remedy, clearly, that remedy is not upon the bond with which they had no connection. Indeed, at the time the bond was executed, they had no judgment, and, of course, no execution.

Whether, notwithstanding the fact that appellants could not take the property upon their execution, it was yet a lien upon it, subject to the lien of the prior execution, is a question we need not now decide. Whether it was or not, it may be that appellants could have protected themselves by having the property put into the hands of a receiver to await the termination of the litigation, or by having Fordyce, Johnson,

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and Plummer enjoined from selling or in any way disposing of the property until it should be determined what disposition was to be made of the first execution or levy. These are questions, again, which we do not decide. What we do decide is, that appellants can not recover upon the bond, and that, hence, the court below properly sustained a demurrer to the complaint.

Judgment affirmed, at appellants' costs.

Filed Dec. 9, 1886.

No. 13,120.

McCONNELL ET AL. v. HUNTINGTON, ADMINISTRATOR.

NEW TRIAL.—*Affidavits.*—*Record.*—*Bill of Exceptions.*—Affidavits in support of a motion for a new trial can only be made part of the record by order of the court or bill of exceptions.

WITNESS.—*Decedents' Estates.*—*Parties.*—Where the action is against an administrator to recover money from the decedent's estate, parties to the record are not competent witnesses as to matters which occurred prior to the death of the decedent.

SUPREME COURT.—*Weight of Evidence.*—*Equity Cases.*—The Supreme Court will not disturb the finding of the trial court upon the weight of the evidence, either in law or equity cases.

From the Marion Circuit Court.

B. F. Davis, for appellants.

A. W. Hatch, for appellee.

ELLIOTT, C. J.—The questions presented by the record in this case arise on the ruling denying the appellants a new trial.

The affidavits in support of the motion for a new trial are not brought into the record by a bill of exceptions, and can not be considered by us. It is well settled that affidavits in support of a motion can not be incorporated in the record

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by making them part of the motion; the proper method of getting them into the record is by a special order of court or a bill of exceptions.

The action was against an administrator to recover money from an intestate's estate, and as the appellants were parties to the record, the court did right in ruling that they were not competent witnesses as to matters that occurred prior to the death of the decedent. R. S. 1881, section 499.

Under our code, the rule forbidding this court from disturbing the finding of the trial court upon the weight of the evidence, is the same in suits in equity as in actions at law. *Lake Erie, etc., R. W. Co. v., Griffin*, 107 Ind. 464.

Judgment affirmed.

Filed Oct. 9, 1886; petition for a rehearing overruled Dec. 11, 1886.

No. 13,348.

PHILLIPS v. THE STATE.

108 406
150 88

CRIMINAL LAW.—*Seduction.—Promise of Marriage.—Evidence.*—In a prosecution under section 1992, R. S. 1881, for the seduction, under a promise of marriage, of a female minor, it must be shown that the intercourse took place subsequent to the promise of marriage, and that such promise was the inducement to the intercourse. For evidence held sufficient, see opinion.

SAME.—*When Affidavit for Continuance Admissible in Evidence.*—Where a trial is had before the court, without a jury, it is not error to admit in evidence an affidavit for a continuance made and filed at a preceding term by the defendant, and acted upon by the same judge who presides at the trial.

From the Gibson Circuit Court.

C. A. Buskirk, W. F. Townsend, M. Fleener, E. A. Ely and J. W. Wilson, for appellant.

F. T. Hord, Attorney General, *J. E. McCullough, J. H. Miller and J. L. Bretz*, for the State.

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Howk, J.—In this case, appellant was charged by an indictment, duly found and returned against him by the grand jury of Gibson county, with the offence which is defined, and its punishment prescribed, in and by section 1992, R. S. 1881. Upon his arraignment and plea of not guilty, he was tried by the court without a jury, and a finding was made that he was guilty, as charged in the indictment, and his punishment was assessed at a fine in the sum of five dollars and imprisonment in the State's prison for a period of three years. Over his motion for a new trial, the court rendered judgment against him upon and in accordance with its finding.

The only error, of which appellant complains, is the overruling of his motion for a new trial.

Section 1992, *supra*, which defines the crime of which appellant was convicted, reads as follows: "Any male person who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, under the age of twenty-one years, shall be deemed guilty of seduction, and, upon conviction, shall be imprisoned in the State prison not more than five years nor less than one year, and fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding six months."

In their brief of this case, appellant's counsel first insist, that the finding of the trial court was not sustained by sufficient evidence and was contrary to law. Of the evidence in the record, counsel say: "True, it shows that Florence O'Neal was under twenty-one years of age; that she was of good repute for chastity; that she and the appellant were engaged to be married; that he held sexual intercourse with her. But (1) it does not show, nor tend to show, that he promised to marry her previously to holding sexual intercourse with her; (2) it does not show, nor tend to show, that his promise of marriage was the means, or the inducement, by which her consent to the sexual intercourse was obtained."

These are the only points, as to which counsel claim the

evidence was insufficient, and these we will briefly notice in their order.

1. In *Callahan v. State*, 63 Ind. 198, it was held by this court, that the evident purpose of the statute above quoted was to make it a penal offence to have illicit intercourse with a female, of the description mentioned, where she is induced to consent thereto, and her consent is obtained, by or through the means of a promise of marriage. In the course of the opinion in the case cited, this court quoted with apparent approval the following definition of the offence: "The offence consists in seducing and having illicit connection with an unmarried female, under promise of marriage. It is enough that a promise is made which is a consideration for or an inducement to the intercourse." *Kenyon v. People*, 26 N. Y. 203. It may be premised, that the evidence shows without contradiction, that appellant commenced visiting the female, named in the indictment, some months before she arrived at the age of seventeen years; that he became her accepted suitor in marriage, not long afterwards, and was her only suitor; that he asked for and obtained her father's consent to their marriage; that within three months after she was seventeen years old, he got her with child; and that she gave birth to a still-born child, and the next day, and before she was eighteen years old, she died. His counsel admit, as we have seen, that she was of good repute for chastity; and there was evidence before the trial court that, after he had knowledge that she was with child by him, he said: "He knew she was a good girl,—good enough for him, and too good." But it is claimed that the evidence does not show, nor tend to show, that appellant promised to marry the girl before he had sexual intercourse with her.

This claim of counsel is not sustained by the evidence. Appellant's own statements and admissions, of his relations to and intercourse with the unfortunate girl, were in evidence before the trial court. He asked the witness, who testified as to such statements and admissions, in substance, if you

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were to get a woman with child, would you marry her? The witness testified: "I told him I would not; he then said, if you were promised to marry her, would you? I told him then, yes, I would." Fairly construed, appellant's own admissions, which were in evidence, clearly showed that he succeeded in seducing the girl on Easter Sunday, 1885, "and that they were promised to be married before that day." If the trial court believed the witnesses, who gave in evidence the statements and admissions of appellant in regard to his sexual intercourse with Florence O'Neal, this evidence fully justified the finding that he had promised to marry her before he accomplished her seduction.

2. But appellant's counsel also insist that the evidence does not show, nor tend to show, that his promise of marriage was the means or the inducement, by which the girl's consent to the sexual intercourse was obtained. We think otherwise. Appellant stated, according to the evidence, that he believed he never would have obtained the girl's consent to the sexual intercourse, but that he kept teasing her for it, and talking to her about it. At last she told him she did not want to do that way—that he must not talk to her that way any more. There is no evidence in the record of this cause which tends to show that Florence O'Neal yielded to the base solicitations and importunities of the appellant from any mercenary motive, or "through the promptings of her own lascivious and lecherous desires." *Bell v. Rinker*, 29 Ind. 267; *Johnson v. Holliday*, 79 Ind. 151. On the contrary, we are of opinion that the evidence in the record tends to show, and fairly shows, that the seduction and ruin of the unfortunate and confiding girl by the appellant were "procured by the use of insinuating arts, wiles and persuasions, on the part of the seducer, to overcome the seduced, without force." This was seduction within the meaning of our laws, criminal as well as civil.

The trial court was fully justified by the evidence, we think, in finding that the appellant's promise of marriage to the young girl was the only consideration for, or inducement to,

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her illicit intercourse with him ; and that he had such illicit intercourse with her by, through or under such promise of marriage, and upon no other consideration.

It was also assigned as cause for a new trial, in appellant's motion therefor, that the trial court had erred in admitting in evidence, over his objection and exception, his affidavit made and filed at the preceding January term, 1886, of such court, for the purpose of obtaining a continuance of this cause. The record shows that appellant objected to the admission of his own affidavit in evidence, upon the grounds "that the same was incompetent, irrelevant and immaterial, and did not tend to support any of the issues in this cause." This affidavit was made and submitted to the trial court by the appellant, for the purpose of obtaining, and thereon he did obtain, a continuance of this cause. If the trial of this cause had been submitted to a jury, there might be, perhaps, some room for debate as to the admissibility of the affidavit in evidence ; but this point is not before us, and we decide nothing in regard to it. This cause was tried by the court, and the same learned judge, to whose consideration he had voluntarily submitted his affidavit, presided at such trial. Surely he can not claim that it was error for the court, under the facts of this case, to admit such affidavit in evidence, nor can he claim that he was prejudiced or injured by such ruling of the court. For such a ruling, even if it were erroneous, we could not reverse the judgment. Section 1891, R. S. 1881; *Clayton v. State*, 100 Ind. 201; *Padgett v. State*, 103 Ind. 550; *Trout v. State*, 107 Ind. 578.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Dec. 9, 1886.

Bowen v. The State.

No. 12,950.

BOWEN v. THE STATE.

CRIMINAL LAW.—*Arraignment and Plea.*—*New Trial.*—*Practice.*—An assignment as a cause for a new trial, that the finding of the court is contrary to law, is sufficient to present the question that the trial was had without arraignment or plea.

SAME.—*Trial Without Plea Erroneous.*—*Record Must Affirmatively Show Plea.*—*Recital in Bill of Exceptions.*—Unless the record in a criminal cause affirmatively shows that a plea to the indictment was entered, either by or for the defendant, the trial is erroneous, and if it fails to show such fact, the defect can not be supplied or cured by a recital in a bill of exceptions, filed subsequent to the trial, that a plea was entered.

ELLIOTT, C. J., dissents.

From the Rush Circuit Court.

W. A. Cullen and *G. W. Young*, for appellant.

L. T. Michener, Attorney General, *M. D. Tuckett*, Prosecuting Attorney, and *W. B. Hord*, for the State.

MITCHELL, J.—Bowen was indicted, tried and convicted in the Rush Circuit Court, for having unlawfully drawn, and threatened to use, a certain dangerous and deadly weapon, to wit, a gun, upon the person of one Edward Commons, contrary to the provisions of section 1984, R. S. 1881. A fine of \$15 was assessed against him.

The only error assigned upon the record here is, that the court erred in overruling the appellant's motion for a new trial.

The propriety of the ruling of the court in overruling a motion to quash the indictment is discussed in the brief.

There being no error assigned calling in question the ruling on the motion to quash, that subject is not before us for consideration.

The next point upon which error is predicated is, that it does not appear from the record, that the appellant was arraigned, or that he pleaded to the indictment. All that appears in the record entry upon that subject is the following: "Comes the State by her attorney; comes also the defendant

108	411
146	681
108	411
156	889
156	686

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in person and by attorney, and moves the court orally to quash the indictment herein, which motion the court overrules, to which ruling the said defendant excepts. Thereupon this cause is submitted to the court for trial without the intervention of a jury."

The finding and judgment of the court were entered on the 29th day of December, 1885, and on the same day the defendant filed a bill of exceptions, into which was incorporated the evidence, the motion for a new trial and the ruling thereon. After the title of the cause, the bill so filed proceeds thus: "Be it remembered that, on the 29th day of December, 1885, the above entitled cause came on for trial, in the Rush Circuit Court, it being the eighth judicial day of the December term of said court, the defendant pleading not guilty, the cause was, by agreement of parties, submitted for trial to the court, and the State to sustain the issues," etc. The bill of exceptions, after setting out the evidence and the motion for a new trial, and the ruling thereon, is formally concluded and signed by the presiding judge.

Conceding that an arraignment and plea were necessary, in order to uphold the finding and judgment of the court, the learned counsel for the State nevertheless contend: 1. That the question argued in this connection is not properly presented, because it is not assigned as a cause for a new trial, that the defendant was not arraigned and did not plead to the indictment. 2. That because of the recital contained in the preface to the bill of exceptions, to the effect that the defendant pleaded not guilty, the record affirmatively shows that a plea was duly entered, and that having pleaded not guilty, it will be inferred that an arraignment was waived by the appellant.

In respect to the proposition that the question is not properly presented by the record, nothing more need be said than that an assignment as a cause for a new trial, such as the second cause assigned in this case, that the finding or decision of the court is contrary to law, is a proper method of saving

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the point that a trial has been had without arraignment or plea. *Tindall v. State*, 71 Ind. 314; *Shoffner v. State*, 93 Ind. 519.

The second proposition presents a question of more importance.

Under the decisions of this court, it can no longer be regarded as a subject of controversy, that where the record in a criminal cause fails to disclose affirmatively that a plea to the indictment was entered, either by or for the defendant, such record on its face shows a mis-trial, and that the proceeding was consequently erroneous, to say the least. *Grater v. State*, 54 Ind. 159; *Fletcher v. State*, 54 Ind. 462, and cases cited; *Tindall v. State*, *supra*; *Shoffner v. State*, *supra*; *Johns v. State*, 104 Ind. 557.

Section 1763, R. S. 1881, enacts, that in all criminal prosecutions, "the defendant may plead the general issue orally, which shall be entered on the minutes of the court." This is to the end that the plea may be entered on the order-book in which the proceedings of the court are recorded and signed by the judge. *Tindall v. State*, *supra*.

In this manner an authoritative and permanent memorial of one of the essential elements to the validity of a criminal trial is provided by statute. The making and preserving of this record is a matter of concern to the accused. It may afford to him the only available evidence in case it thereafter becomes necessary to plead or prove a former acquittal or conviction of the same offence.

May this record be supplied by a recital, such as that above set out, in a bill of exceptions filed in the case after the trial has been concluded?

That it can not, necessarily results from two considerations: The *first* is, that the statute in terms requires that the plea shall be entered on the minutes of the court, so that it may be entered on the order-book, and that by this means the evidence that a plea was entered may not be subject to the

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chance of loss or misplacement, as is the case with a mere paper among the files of the cause.

Second. It is no part of the office of a bill of exceptions to supply that which is essential to the validity of, and which the law requires to appear upon, the record of the court.

A definition of a bill of exceptions, which embraces the provisions of both the civil and criminal codes, upon that subject, runs thus: "A formal statement, in writing, of exceptions taken to the opinion, decision, or direction of a judge, delivered during the trial of a cause; setting forth the proceedings on the trial, the opinion given, and the exception taken thereto, and sealed by the judge in testimony of its correctness." 2 Works Pr., section 1075. *Galvin v. State*, *ex rel.*, 56 Ind. 51; *Redinbo v. Fretz*, 99 Ind. 458.

It has often been held that where during the progress of a trial, time is given until after the term to file a bill of exceptions, the order granting time must appear of record, and that the record of such order can not be supplied, by reciting in the bill that time had been given. Such a recital in a bill, it has been held, will not, without other competent proof, authorize the making of a *nunc pro tunc* order granting time. *Schoonover v. Reed*, 65 Ind. 313; *Nye v. Lewis*, 65 Ind. 326; *Jones v. Jones*, 91 Ind. 72, and cases cited.

In short, it may be said, that those things which, in order to the validity of the judgment or proceeding, are required affirmatively to appear upon the record, can not be omitted therefrom, and then be supplied by bills of exceptions afterwards filed in the case.

It could with equal propriety be urged that the verdict of a jury or the finding of the court might be omitted from the record, and that such omission might be supplied by a recital in a bill of exceptions, as that the plea of not guilty might be thus omitted and supplied.

In either case the record on its face would show a mis-trial, and, perhaps, be a nullity. It would be a mere accident, if any one examining to ascertain whether the record of the cou-

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viction would afford proof in a subsequent trial of a former conviction of the same offence, would happen to discover in a bill of exceptions, that there had been a plea or a finding before the entry of judgment.

It was error not to grant a new trial for the second cause assigned, and because the record in this case might not bar a second prosecution for the same offence, we are of opinion that it can not be said of the irregularity in failing to enter the plea of not guilty, that it was a merely harmless error.

The judgment is therefore reversed.

ELLIOTT, C. J., does not concur in this opinion.

Filed Dec. 10, 1886.

No. 13,190.

108	415
139	126

STOOTS v. THE STATE.

JUROR.—*Bias.*—*Incompetency.*—*Intoxicating Liquor.*—*Criminal Law.*—One who, upon the examination touching his qualifications to serve as a juror, in a prosecution for unlawfully selling intoxicating liquor, admits that he would allow less weight and credit to the testimony of the defendant, if he should testify in his own behalf, than he would if such defendant were not engaged in the business of selling liquor, is incompetent.

From the DeKalb Circuit Court.

H. Colerick, D. D. Moody and W. L. Penfield, for appellant.

F. T. Hord, Attorney General, *H. C. Peterson*, Prosecuting Attorney, and *C. Emanuel*, for the State.

NIBLACK, J.—Stoots, the appellant, was prosecuted in the court below, upon affidavit and information, under section 2098, R. S. 1881, for selling intoxicating liquor on Sunday to be drunk as a beverage. A jury found him guilty as charged, and a judgment of conviction was rendered upon the verdict.

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When the cause was called for trial, and a jury was about to be empanelled, it was admitted by counsel for the State that the appellant was, at the time the offence was charged to have been committed, and still was, engaged in the business of selling intoxicating liquors by retail, under a license issued to him by order of the board of commissioners of DeKalb county. One William J. Bowman was then called as a juror, and, after being duly sworn to answer questions touching his qualifications to act in that capacity, one of the appellant's attorneys inquired of him as follows: "I will ask you to state whether, if the defendant were to testify in his own behalf in this cause, you would allow less weight and credit to his evidence, in his own behalf, than you would if he were not engaged in the business of selling liquors?" To this Bowman answered: "I think I should." Thereupon counsel for the appellant challenged Bowman for cause, but the circuit court held that the answer thus given did not disqualify him from serving as a juror in the trial of the cause, and overruled the challenge. The circuit court also refused to permit a similar question to be propounded to two other persons called to serve as jurors, to which exceptions were reserved.

The pertinency of the question so addressed to Bowman, and the materiality of his answer as affecting his competency as a juror, have been made questions for decision upon this appeal.

Our statute makes it a misdemeanor to sell intoxicating liquor on Sunday to be drunk as a beverage, and imposes many other restrictions upon the sale of intoxicating liquor not imposed upon other branches of business. It has always been the policy of the law in this State to treat the business of selling intoxicating liquors as exceptional, and as one requiring regulation and restraint, and it is a matter within the common knowledge of all that the propriety of permitting the sale of intoxicating liquors as a beverage, under any cir-

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cumstances, has long been, as it still is, a subject of very earnest discussion, and upon which there is a great diversity of opinion. The mere fact, therefore, that a man may be opposed to the policy of permitting the sale of intoxicating drinks, and may have some prejudices against those engaged in the sale of intoxicating liquors, does not necessarily disqualify him from serving as a juror in a prosecution for the unlawful sale of that class of liquors. This has been, in effect, heretofore held by this court. *Chandler v. Ruebelt*, 83 Ind. 139; *Shields v. State*, 95 Ind. 299. The same doctrine has also been recognized by the Supreme Court of Illinois. See *Robinson v. Randall*, 82 Ill. 521; *Meaux v. Whitehall*, 8 Brad. Rep. 173. But, so far as we are advised, it has never been held that a person called to serve as a juror, who admits that his prejudices against a business, recognized as lawful, are so fixed that he might not, and probably would not, give to the testimony of a party engaged in it as much weight and credit as he would if the party were employed in some other business, is a competent juror to try a cause involving the business against which such prejudices are admitted to exist. On the contrary, the fair inference, from the drift of the authorities bearing on the general subject, is, that a person so moved by his prejudices is at least *prima facie* incompetent as a juror to try such a cause. See *Robinson v. Randall*, *supra*; *Meaux v. Whitehall*, *supra*; *Chandler v. Ruebelt*, *supra*; *Shields v. State*, *supra*; also, *Mima Queen v. Hepburn*, 7 Cranch, 290; *People v. Allen*, 43 N. Y. 28; *Chicago, etc., R. R. Co. v. Adler*, 56 Ill. 344; *Sam, a Slave, v. State*, 13 Sm. & M. 189; *Curry v. State*, 4 Neb. 545; *Block v. State*, 100 Ind. 357.

The answer of Bowman to the question addressed to him in this case did not indicate any leaning against, or ill will or aversion towards, the appellant personally, and hence did not present a condition of mind amounting to *actual* bias against him, but did, as we believe, manifest an *implied* bias

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against him as a party in the cause, as well as against his defence, within the spirit and meaning of that term as defined in the case of *Block v. State, supra*. It manifested a bias against all persons engaged in the same business, and consequently an *implied* bias against the appellant as the defendant in this prosecution.

The precise formula which may be adopted in the examination of a person called to serve as a juror, for the purpose of testing his competency, and the extent to which such an examination may be carried, necessarily rest very largely in the discretion of the *nisi prius* court; but such an examination ought not to be permitted to take an indefinitely wide range, concerning merely collateral or incidental matters having some possible connection with the cause, and, in that connection, it is suggested that the question addressed to Bowman as above was to a matter too collateral, as well as too remote, to be material as affecting his competency as a juror, and that on that account his answer did not disclose any bias against the appellant on the merits of the cause.

There is some pertinency in this suggestion, but, upon full consideration, we are of the opinion that, in view of the appellant's right to challenge peremptorily, as well as for cause, and, as incident to that right, the propriety of his first being able to ascertain the proposed juror's preconceived opinions on the subject of the liquor traffic, including his estimate of the character of persons engaged in it, the question was not an improper one; that, in fact, the inquiry, implied by the question, was one the appellant was entitled to make of all the persons called as jurors.

If the examination of Bowman had been further continued, and his subsequent answers had disclosed that, notwithstanding his apparent bias against those engaged in the sale of intoxicating liquor, he could have given the evidence at the trial all the weight to which it was entitled, and have tried the cause impartially upon its merits, a different question

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would have been presented. See *Shields v. State, supra*; *Butler v. State*, 97 Ind. 378; *People v. Carpenter*, 102 N. Y. 238.

The judgment is reversed, and the cause remanded for a new trial.

Filed Dec. 11, 1886.

108	419
124	598
108	419
144	66

 No. 12,871.

QUICK v. MILLIGAN.

DEED.—Escrow.—Delivery Before Performance of Condition.—Fraud.—Estoppel.—Good-Faith Purchaser.—Where a deed is executed and placed in the hands of a third person to be delivered to the grantee, who is already in possession of the land, only upon payment of the purchase-money, but such third person, in violation of his duty, delivers the deed, on fraudulent representations of the grantee, before the performance of the condition, and it is duly recorded, the grantor is estopped to assert title as against a subsequent good-faith purchaser.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

C. V. McAdams, for appellee.

ELLIOTT, C. J.—We condense from the special finding of the trial court these material facts:

In October, 1884, the appellant, her sisters, Catherine Evans and Sarah Pugh, and their nephew, Samuel Etchison, were the owners in fee of the undivided one-fifth part of a tract of land, and Samuel Etchison was the occupant of the land, yielding rent to his co-tenants. In the month named Etchison made a contract with each of his co-tenants for the purchase of their respective interests in the land. Pursuant to the terms of the contract the appellant, who lived in Jasper county, in conjunction with her husband, on the 27th day of December, 1884, signed and acknowledged a deed conveying the land to Etchison. This deed she sent by mail to her

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sister, Catherine Evans, with instructions to deliver it to Etchison only upon the condition that he paid the amount of the purchase-money of the land—three hundred and seventeen dollars—and not to deliver the deed until the money was paid. These instructions were received by Catherine Evans before she gave the deed to Etchison. After these instructions had been imparted to her, Catherine Evans did, in violation of those instructions, deliver the deed to the grantee named in it, without the payment of the purchase-money, delivering, at the same time, her own deed, and her sister Sarah also delivered hers. The deeds were all delivered on the false and fraudulent representation of Etchison that he would immediately mortgage the land, thus obtain money, and pay for the land. The delivery of the deed to Etchison was made without the knowledge or consent of the appellant. The deeds received by Etchison were placed on record on the 5th day of March, 1885. After the deeds were recorded, and while Etchison was in possession of the land, it was purchased of him in good faith, without notice of any fraud, for a fair price fully paid, and in the belief that the deeds were valid, and with knowledge of Etchison's possession, by the appellee, George Milligan, and a deed was executed to him by Etchison.

It is the contention of the appellant that on these facts the law should have been declared to be with her. This contention is asserted by counsel on the strength of the cases which hold, that, where a deed is placed in the hands of a third person to be delivered to the grantee upon the performance of a certain condition by the grantee, a delivery in violation of the condition will not make the deed effective. In support of this position counsel cite many cases, among them *Berry v. Anderson*, 22 Ind. 36, *Robbins v. Magee*, 76 Ind. 381, *Freeland v. Charnley*, 80 Ind. 132, *Vaughan v. Godman*, 94 Ind. 191, *Burkam v. Burk*, 96 Ind. 270, *Stringer v. Adams*, 98 Ind. 539, *Vaughan v. Godman*, 103 Ind. 499, *Harkreader v. Clayton*, 56 Miss. 383 (31 Am. R. 369), *Chip-*

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man v. Tucker, 38 Wis. 43 (20 Am. R. 1), *Stanley v. Valentine*, 79 Ill. 544, *Smith v. South Royalton Bank*, 32 Vt. 341, *People v. Bostwick*, 32 N. Y. 445, *Black v. Shreve*, 13 N. J. Eq. 455, *Dyson v. Bradshaw*, 23 Cal. 528, *Ogden v. Ogden*, 4 Ohio St. 182, *White v. Core*, 20 W. Va. 272.

We have not the slightest doubt that the abstract proposition stated by counsel is correct, for we understand it to be a rudimentary rule in the law of real property, that a deed delivered as an escrow is not effective if placed in the hands of the grantee in violation of a condition upon which the person who holds as an escrow is authorized to deliver it. If this proposition is broad enough to cover the case, the appeal must be sustained; but we can not grant this essential requisite, for there remains the question of estoppel. It might be conceded, that in ordinary cases, where the grantor remains in possession, the delivery of a deed, by one who received it as an escrow, in violation of the condition upon which he was authorized to deliver it, would not make the deed effective to convey title, and yet there might be circumstances which would estop the grantor from asserting title against a *bona fide* purchaser.

Title to land may be transferred and acquired by estoppel. *Pitcher v. Dove*, 99 Ind. 175, and cases cited. In speaking of the application of the doctrine of estoppel to land, a recent writer says: "This principle applies irrespective of the nature of the property sold, and the estoppel will be so moulded as to prevent fraud and injustice in whatever form it may present itself." Herman Estoppel and Res Adjudicata, section 931.

The Supreme Court of the United States, in discussing the general subject, said: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This

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remedy is always so applied as to promote the ends of justice." *Dickerson v. Colgrove*, 100 U. S. 578.

In our own court it has been said: "It is not necessary in order to the existence of an equitable estoppel that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief of the existence of a state of facts which it would be unconscionable to deny; but it is not essential that he should have been guilty of positive fraud in his previous conduct." *Anderson v. Hubble*, 93 Ind. 570 (47 Am. R. 304).

This doctrine has been asserted by this court in other cases, and is well sustained by the decisions of other courts. *Pitcher v. Dove*, *supra*; *Vilas v. Mason*, 25 Wis. 310; *Foster v. Bettsworth*, 37 Iowa, 415; *Rudd v. Matthews*, 79 Ky. 479 (42 Am. R. 231); *Racine Co. Bank v. Lathrop*, 12 Wis. 466; *Chynoweth v. Tenney*, 10 Wis. 397; *Continental Nat'l Bank v. National Bank*, 50 N. Y. 575; *Blair v. Wait*, 69 N. Y. 113.

The wrong constituting the legal fraud is the repudiation of what the conduct of the party has made appear true, to the injury of another, who, in good faith, has acted upon an apparent state of facts created by the conduct of the person who makes the denial of what his conduct implies. Negligence may sometimes constitute legal or constructive fraud, as is well illustrated by the forcible opinion in *Stevens v. Dennett*, 51 N. H. 324, where it was said: "Thus, negligence becomes constructive fraud,—although, strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be innocent, if innocence and gross negligence may be deemed compatible."

There is another principle applicable here, and that is this: Where one of two innocent persons must suffer, he must be the sufferer who put it in the power of the wrong-doer to cause the loss, or as it has been said. "He certainly who trusts most ought to suffer most." Where one of two innocent parties must suffer, he through whose agency the loss

Quick v. Milligan.

occurred must sustain it. *Le Neve v. Le Neve*, 3 Atk. 646; *New v. Walker*, ante, p. 365; *Hunter v. Fitzmaurice*, 102 Ind. 449.

It is also a familiar principle that where one is in possession of land and has a deed of record, the possession will be referred to his deed, unless there are facts known to one who is about to acquire an interest in the land indicating a different possessory right. 1 Washburn Real Prop., star p. 35. Possession is often presumptive evidence of title, and one who finds on record a deed duly executed and recorded may surely act upon the presumption that as the paper title and the possession coincide, the possession is under the deed. 1 Washburn Real Prop., star p. 35.

In discussing a question very similar to the one before us, MARSHALL, C. J., said: "Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect can not be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and intercourse between man and man would be very seriously obstructed, if this principle were overturned." *Fletcher v. Peck*, 6 Cranch, 87, 133. This doctrine was unqualifiedly approved in *Somes v. Brewer*, 2 Pick. 184.

It is clear to our minds that these principles carry the case for the appellee, for it was the appellant who put it in the power of the wrong-doer to do the act complained of. She it was who suffered him to remain in possession of land, and placed in another's hands a deed which gave to that possession the fullest and most complete indicia of absolute ownership. The purchaser found the vendor equipped with the most potent evidences of ownership, for he had a recorded

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conveyance, and he had possession. There was nothing wanting to an absolute and perfect title so far as visible and ascertainable facts disclosed.

Possession by the grantee named in the deed is an important element in the case, and it is an element that distinguishes the case from those cited by the appellant. Had the grantor retained possession, those cases might control, but here it was the grantee who had possession of the land. If a purchaser is not safe in buying where there is on record a properly framed deed, and the person named in the deed is in possession of the land conveyed by the deed, then, indeed, would titles be insecure and the purchase of lands hazardous. We have no doubt that where the two great elements of ownership, a deed and possession, are united in one person, a *bona fide* purchaser will be protected, although the person to whom the deed was entrusted to be delivered on the performance of a condition, may have delivered the deed in violation of his duty.

Judgment affirmed.

Filed Dec. 10, 1886.

 No. 12,492.

CLAYPOOL ET AL. v. GISH.

108	424
150	96
108	424
161	274

APPEAL.—*By Party to Action Against Decedent's Estate.*—Where one is made a party to an action against an estate, founded on a claim for which he is not jointly bound with the decedent by contract, he is not required to appeal under the statute regulating appeals in matters connected with decedents' estates, but may appeal under the code of civil procedure.

PRINCIPAL AND AGENT.—*Attorney and Client.*—*Pleading.*—*Complaint.*—*Demand.*—*Decedent's Estate.*—A complaint against an agent or attorney, to recover money alleged to be in his hands, which fails to aver a demand by the principal, and a refusal by the agent or attorney, prior

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to the bringing of the action, is bad, even where the latter is joined as a defendant in a claim against a decedent's estate.

From the Fountain Circuit Court.

T. F. Davidson, for appellants.

L. Nebeker and *H. H. Dochterman*, for appellee. .

MITCHELL, J.—It appears from the record of this cause that, on the 10th day of September, 1884, a claim theretofore filed by the appellee in the clerk's office, was transferred to the issue docket of the Fountain Circuit Court.

The claim was in the form following:

"Estate of Joseph Ristine and George McWilliams, deceased, Solomon Claypool, William A. Ketcham and John McManomy. To Abraham Gish, Dr.

"March 1st, 1883. To claims in favor of John McManomy, and assigned to Abraham Gish, against the Indianapolis, Bloomington and Western Railway Company, collected by said Ristine and McWilliams, through Solomon Claypool and William A. Ketcham, composing the firm of Claypool & Ketcham. * * * Amount due A. Gish, \$164.09."

The claimant, in an affidavit attached to the claim stated as above, deposes and "says that the above claim in favor of Abraham Gish, against the estate of Joseph Ristine and George McWilliams, is correct," etc.

Subsequently, Claypool & Ketcham appeared specially, and moved the court to dismiss, as to them, on the ground that, on the face of the claim, as it is stated on the record, no cause appeared for making them parties to the action or proceeding. This motion was overruled.

On the 15th day of December, 1884, the claimant filed a second paragraph of complaint. The facts therein stated are, in substance, that, on a given date, McManomy held certain claims against the Indianapolis, Bloomington and Western Railway Company, which were placed in the hands of Ristine & McWilliams for collection. Ristine & McWilliams sent the claims to Claypool & Ketcham, attorneys residing

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in the city of Indianapolis, for collection. Afterwards Ristine & McWilliams died, and the claims were assigned to Gish. The complaint avers that Claypool & Ketcham collected \$479.50 on the claims, and that after deducting their attorney's fees, there remained in their hands the sum of \$446.75, of which sum they paid over to Gish, \$295.84, leaving due and unpaid the sum of \$164.09.

In this paragraph, as in the claim originally filed, the estates of Ristine & McWilliams are joined as defendants, with Claypool & Ketcham. There was a joint judgment against all, by default.

Claypool & Ketcham prosecute this appeal and assign, among other alleged errors, that the complaint does not state facts sufficient to constitute a cause of action against them.

The appellee has filed a motion to dismiss the appeal, on the ground that it has not been taken and perfected according to the provisions of sections 2454 to 2457, R. S. 1881, inclusive, as amended by the act of April 11th, 1885, Acts 1885, p. 194.

The proceedings, as presented by the record, are anomalous. To the estates of two deceased partners, which are treated as one separate entity, like an existing partnership, the appellants are joined as defendants, and because they are so joined, it is contended an appeal can not be prosecuted by them except under and in pursuance of the provisions of the statute regulating appeals in matters growing out of, or connected with, a decedent's estate.

Section 2324, R. S. 1881, as amended by section 11 of the act of March 7th, 1883 (Acts 1883, p. 156), provides, in substance, that when any claim against a decedent's estate "is transferred for trial, * * * if it shall be shown to the court that any person is bound with the decedent in any contract which is the foundation of the claim, the court shall direct that the claim be amended by making such person a defendant in the action, and process shall be issued against and served upon him, and thereafter such action shall be prosecuted

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against him as a co-defendant with such executor or administrator, and judgment shall be rendered accordingly."

We need not decide whether, in case it had been shown to the court that the appellants were bound in any contract with either or both of the estates against which the claim was filed, the law regulating appeals in matters connected with the settlement of decedents' estates would, or would not, have controlled. It is enough to say, the record discloses that the estates mentioned, and the appellants, if liable at all, are not jointly bound in any contract, either express or implied, which constitutes the foundation of such liability. Before a party can be summoned to answer to a claim filed against the estate of a deceased person, it must be made to appear that the person so summoned, and the person against whose estate the claim is pending, were jointly liable by a contract which furnishes the basis of the pending claim.

Upon the face of the claim as it appears in the record now before us, it is apparent that if the estates of the deceased members of the firm of Ristine & McWilliams are liable to the claimant, such liability depends entirely upon the implied obligation which arose between Ristine & McWilliams when they received the claim from McManomy for collection. With that obligation Claypool & Ketcham have no connection or privity whatever. If they are liable, their liability does not grow out of any contract in which they were jointly bound with Ristine & McWilliams.

The right of a party to appeal under the code of civil procedure can not be cut off or abridged by joining him as defendant, in an action against an estate, such action being founded on a claim for the payment of which the appellant is not jointly bound with the decedent by contract. The motion to dismiss the appeal must therefore be overruled. The assignment of error already referred to must also be sustained.

If either paragraph of the complaint states a cause of action against any one, it is certainly not against the appellants. The facts stated in the claim as originally filed fail to raise

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even an inference that the money sued for was ever received by the appellants. Nor do the facts there recited show that, if any money was received by them, they have not accounted for, and paid it over to the persons entitled to receive it from them. Indeed, the inference to be drawn from the whole statement, including the affidavit of the claimant, is, that whatever is due him is a claim against "the estate of Joseph Ristine and George McWilliams."

The second paragraph falls far short of stating facts which would entitle the plaintiff below to maintain the action. It does not charge that any part of the money remains in the hands of the appellants. Nor is it averred that there was any demand upon them for an accounting, or a refusal on their part to pay.

The law is well settled that a suit can not be maintained against an agent or attorney, to recover money alleged to be in his hands, until after a demand of payment by the principal, and a refusal to pay on the part of the agent or attorney. *Pierse v. Thornton*, 44 Ind. 235, and cases cited; *Heddens v. Younglove*, 46 Ind. 212; *Terrell v. Butterfield*, 92 Ind. 1.

The cases hold that this averment is so essential, that a motion in arrest will be sustained on account of its absence from the complaint. *Pierse v. Thornton*, *supra*; *Eberhart v. Reister*, 96 Ind. 478.

It is claimed that the averment of a demand, and a refusal to pay, is not necessary, because the appellants were joined as defendants in a claim against an estate. Even if the appellants had been properly joined, we think it would have been necessary, that a sufficient statement of a cause of action against them should have been made. That fact could not have avoided the necessity of a sufficient complaint. But as we have already seen, they were not properly joined with the estates of "Ristine & McWilliams," if, indeed, there was any claim filed in the first instance, which gave the court jurisdiction over any person or estate. We know of no statute or

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practice which justifies the filing of a claim against the estates of deceased partners, by the method pursued in this case.

The judgment is reversed, with costs.

Filed Dec. 11, 1886.

No. 12,553.

STAIR v. RICHARDSON.

108	429
140	198
108	429
184	452

BILL OF EXCEPTIONS.—*Statement that it Contains all the Evidence.*—*Verdict.*—

A statement in the bill of exceptions, following the evidence, that "this was all the evidence introduced to the jury in the trial of the cause," is the substantial equivalent of "this was all the evidence given in the cause," where the question is as to the sufficiency of the evidence to sustain the verdict of the jury.

PARTNERSHIP.—*Dissolution.*—*Assignment by One Partner of Chose in Action.*—*Authority.*—After the dissolution of a partnership, one partner can not assign or transfer a chose in action belonging to the firm, without special authority, either express or implied, from the other partner.

PROMISSORY NOTE.—*Account.*—*Assignment.*—*Denial Under Oath.*—*Burden of Proof.*—Where the assignment of a note or account sued on is denied under oath by the defendant, the burden is on the plaintiff to show a sufficient assignment by a preponderance of the evidence.

From the Marshall Circuit Court.

E. C. Martindale and S. Parker, for appellant.

M. A. O. Packard and C. Richardson, for appellee.

NIBLACK, J.—Complaint by Charles Richardson against Frederick Stair in two paragraphs.

The first paragraph charged that the defendant was indebted to the plaintiff in the sum of \$302.25 for services performed by A. C. and A. B. Capron, as lawyers; also by A. C. Capron and the plaintiff as lawyers; also by A. C. Capron. Likewise for money paid out and expended, and for work and labor done, by the several parties named as above, all at the special instance and request of the defendant, and as further illustrated by a bill of particulars. The paragraph also

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charged that the accounts for these services and the money expended had been, on the 12th day of January, 1885, assigned and transferred to the plaintiff.

The second paragraph counted upon three promissory notes which had been executed by the defendant to other persons, and which, it was averred, had also been assigned and transferred to the plaintiff.

The defendant answered in eleven paragraphs. The first paragraph was in general denial, and the rest set up special matters in defence.

The third paragraph was duplex and informal in its character, but it, among other things, argumentatively denied the assignments of the accounts and notes in suit, and its averments were supported by the oath of one of the attorneys for the defendant. Reply in denial of the special paragraphs of answer.

There was a verdict for the plaintiff on both paragraphs of the complaint, and, over a motion for a new trial, challenging the sufficiency of the evidence and alleging the occurrence of other errors at the trial, the plaintiff had judgment on the verdict.

Error is assigned upon the overruling of the motion for a new trial, and that assignment of error is the only one relied on in argument for a reversal of the judgment.

The bill of exceptions, purporting to contain the evidence given in the cause, concludes as follows: "And this was all the evidence, both oral and written, which was introduced to the jury in the trial of said cause."

The point is made that this statement is not the equivalent of saying, "And this was all the evidence given in the cause," and that hence the evidence is not properly before us.

This latter expression is more comprehensive in its terms than the statement contained in the bill of exceptions, but where, as in this case, the question is as to the sufficiency of the evidence to sustain the verdict, a statement that "this was all the evidence *introduced* to the jury in the trial of the cause"

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is the practical equivalent of a statement that "this was all the evidence *given* in the cause." When evidence is spoken of as having been *introduced* in a cause, the reasonable inference is that the evidence referred to was *admitted and considered* in the cause, and when the verdict returned by a jury is sought to be reviewed upon the evidence, a statement that the evidence set out in the bill of exceptions was all the evidence *introduced* to the jury at the trial, is substantially the same as saying that the evidence so set out was all that was *given* to the jury at the time of the trial, and hence is all that can or need be considered in support of the verdict. *Beatty v. O'Connor*, 106 Ind. 81. We are, consequently, led to the conclusion that the evidence certified to us in this case is properly in the record.

Albertus C. Capron was called as a witness for the plaintiff. He stated that he was the A. C. Capron referred to in the complaint; that he and A. B. Capron, also referred to, had been for many years previous to 1880, partners in the practice of the law under the firm name of Capron & Capron; that in the year 1880, he dissolved partnership with the said A. B. Capron, and then formed a partnership with the plaintiff, Richardson; that he continued to practice law as a partner with the plaintiff until May, 1884, when he and the plaintiff also dissolved partnership; that a very considerable part of the services sued for were performed by the firm of Capron & Capron, and the rest were rendered by the firm of Capron & Richardson, at the same time verifying, in general terms, the correctness of the bill of particulars accompanying the first paragraph of the complaint; that, on the 12th day of January, 1885, he had a settlement of his partnership business with the plaintiff, and then assigned to him, the plaintiff, the account embraced in the bill of particulars, as well as the notes described in the second paragraph of the complaint.

The witness did not claim to have had, and there was no evidence tending to prove that he had, any special authority.

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to assign the interest of A. B. Capron, either in the account or any of the notes, one of which appears on inspection to have been executed to the firm of Capron & Capron.

After the dissolution of a partnership, one partner has no power to assign or transfer a chose in action belonging to the firm, without some special authority, either express or implied, from the other partner or partners. After the dissolution the former members of the firm are no longer partners, but are only tenants in common; and, where there is no agreement to the contrary, each partner, after dissolution, possesses the same authority to adjust the affairs of the firm, by collecting its debts and disposing of its property, as before the dissolution, but such former partners can no longer bind each other, even by varying the form of existing obligations. After dissolution one partner can not endorse a partnership note, even to pay a prior debt of the firm. 1 Parsons Con. (7th ed.), p. 194, section 14; *Whitworth v. Ballard*, 56 Ind. 279.

The validity of the assignment of the account and notes having been denied under oath, it devolved upon the plaintiff to prove, by a preponderance of evidence, that a valid and proper assignment of the account and notes had been made, as was inferentially alleged by the complaint. *Lucas v. Baldwin*, 97 Ind. 471. This, as has been seen, the plaintiff failed to do. The verdict was, consequently, not sustained by sufficient evidence.

The circuit court instructed the jury that as to all the paragraphs of the answer, except the first, the defendant, to maintain his defence, was required to establish the facts as respectively alleged by a preponderance of evidence.

For the reasons already given, this instruction, in its application to the third paragraph of the answer, was erroneous. *Carver v. Carver*, 97 Ind. 497.

The judgment is reversed; with costs, and the cause remanded for further proceedings.

Filed Dec. 10, 1886.

Buchanan v. Milligan.

No. 12,828.

BUCHANAN v. MILLIGAN.

SPECIAL FINDING.—*Must be Complete.*—*Judgment.*—Where a judgment rests on a special finding of facts, all the material facts essential to support it must appear, as nothing will be supplied by intendment.

SAME.—*Appeal Bond.*—*Lost Instrument.*—*Finding as to Terms and Conditions.*—Where a party is sought to be made liable on an appeal bond which is averred to be lost, its terms and conditions must be so fully stated in the special finding that the nature of the undertaking may be ascertained and the extent of the liability of the obligor be made known as matter of law.

SUPREME COURT.—*Special Finding.*—*New Trial.*—*Mandate on Reversal of Judgment.*—Where a special finding of facts is so complete that nothing remains but to pronounce and apply the law, the mandate on reversal will be that judgment be rendered on the special finding; but where it appears from the whole record that justice can only be done by directing a new trial, that course will be adopted.

SAME.—*Powers of Courts.*—Courts will exercise such authority as will promote justice and prevent wrong.

From the Huntington Circuit Court.

C. B. Stuart, W. V. Stuart and W. H. Trammel, for appellant.

ELLIOTT, C. J.—When this case was in this court the first time, the complaint was held bad and the judgment reversed. *Buchanan v. Milligan*, 68 Ind. 118. On the return of the case to the court below, the complaint was amended and the amended complaint is again assailed. However, as we are without a brief from the appellee, we do not pass upon its sufficiency, but reverse the judgment upon another point, preferring this course in order that the subject may be more fully discussed.

The judgment rests on a special finding of facts, and in such cases it is well settled that all the material facts essential to support a judgment must appear, for nothing can be supplied by intendment. *Dixon v. Duke*, 85 Ind. 434; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186, and cases cited; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Hassel-*

108	433
124	88
126	307
108	433
128	394
129	416
126	417
108	433
130	40
108	433
126	530
108	433
140	219
108	433
146	153
146	576
108	433
167	538

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man v. Carroll, 102 Ind. 153; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151.

In the finding before us, there is one material fact, at least, not properly stated in the finding, and that is the character and condition of the appeal bond on which the action is founded. The finding in this particular is defective. It is stated in the special finding that the defendant, Samuel Buchanan, executed the appeal bond, but it is not stated that it was the bond sued on, nor are the terms and conditions of the bond set forth. In this condition of the record, we can not ascertain that the appellant executed the bond sued on, nor can we ascertain the terms and provisions of any bond executed by him. Where a defendant is sought to be made liable on an appeal bond, which is averred to be lost, as is the case here, its terms and conditions must be so fully stated that the nature of the undertaking may be ascertained, and the extent of the liability of the obligor be made known as matter of law.

The judgment is reversed, with instructions to grant the appellant's motion for a new trial, as this will accomplish substantially the same result as the award of a *venire de novo*, and justice will best be done in this way.

Section 660, R. S. 1881, provides, among other things, that the Supreme Court "shall remand the cause to the court below, with instructions for a new trial, when the justice of the case requires it," and in several cases like this we have pursued that course. *Shannon v. Hay*, 106 Ind. 589; *Sohn v. Cambern*, 106 Ind. 302; *Western Union Tel. Co. v. Brown*, *post*, p. 538.

There are cases where it is evident from the face of the record that injustice would result from directing judgment on the special finding; and, in such cases, we think it is not only within our power, but that it is our duty, not to direct judgment upon the facts contained in the special finding, but to remand the case for a new trial. It is by no means every

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case where this course will or should be pursued ; but where, as here, it appears from the whole record, that justice can only be done by directing a new trial, that course will be adopted. Where the special finding is apparently full and perfect, and it appears that nothing remains but to pronounce the law and apply it to the facts, then the mandate should be that judgment be rendered on the special finding. Usually the special finding does so exhibit all the facts as to make it apparent that all that need be done is to apply the law to them, and in such a case the proper mandate is to render judgment on the facts.

It is an old maxim that "It is the duty of the judge, when requisite, to amplify the limits of his jurisdiction," and while, like most general maxims, it should not be taken without limitation, still it expresses the spirit of the law, which is that courts will exercise such authority as will promote the cause of justice and prevent wrong. It is in accordance with this general principle that it is held that appellate courts may modify a judgment, or may reverse it in whole or in part, as the justice of the case requires. *Powell Appell. Proceed.* 341. Our statute, as we think, intended to give express utterance to this general principle. R. S. 1881, sections 661, 662.

The provision of the code first referred to can not be justly confined exclusively to cases where there is a motion for a new trial, and the reversal is based on the ruling on that motion, for, in such cases, that would be the natural result of the judgment of reversal, without any express statutory provision. It needed no statutory declaration to produce that result where the judgment of the appellate court is founded on such a motion. It is evident, therefore, that the statutory provisions were meant to confer authority to do just what its terms imply, that is, direct a new trial "in all cases where justice requires it," leaving it for the Supreme Court to determine whether the case is one in which justice requires that a new trial should be directed, since to hold otherwise would be to declare that some of the words of the

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statute are superfluous, and this is a conclusion forbidden by long settled rules of construction. This construction is the only one which gives reasonable effect to all the words of the statute, and relieves the Legislature from the imputation of having used unnecessary and meaningless words; and it is also a construction which gives fair and just effect to a remedial statute which was meant to invest the highest court of the State with power to make such orders as will secure justice to litigants.

Filed Dec. 11, 1886.

108	436
124	108
108	436
153	511
153	610
108	436
159	41

No. 12,884.

JOUCHERT v. JOHNSON ET AL.

PLEADING.—*Demurrer.*—*Amendment.*—*Filing New Paragraph.*—*Waiver of Exception.*—Where, after a demurrer is sustained to a complaint, another pleading, styled a second paragraph of complaint, is filed, the latter will be treated as an amended complaint, and as waiving an exception to the ruling on the demurrer.

MARRIED WOMAN.—*Mortgage.*—*Complaint to Enforce.*—*Necessary Averments.*—*Power to Contract.*—Where it appears on the face of a complaint seeking to enforce a mortgage, that the latter was executed by a married woman and upon her separate property, it is necessary that it should be alleged that the debt which the mortgage was given to secure was contracted by her, and that it inured either to the benefit of herself or her estate, in order to show that the contract was one which she had power to make.

SAME.—*Acceptance by Mortgagee of Husband's Note.*—*Showing that Debt was Contracted by and for Benefit of Wife.*—Where a mortgage is executed by a husband and wife upon the latter's land to secure the payment of a commercial note executed concurrently with it by the husband alone, the mortgagee is not concluded by the acceptance of such note of the husband from showing that the debt evidenced by it was contracted by and for the benefit of the wife.

MORTGAGE.—*Promise to Pay Debt.*—*Effect as Security.*—*Statute of Limitations.*—Except as it is affected by the statute of limitations, a mortgage has the same force and effect as a security for a debt, whether it contains an express promise to pay written therein or not.

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PRACTICE.—Pleading.—Evidence.—Harmless Error.—Supreme Court.—Where an error is committed in sustaining a demurrer to a paragraph of complaint, in order to prevent a reversal it must affirmatively appear that there was another paragraph under which the same facts might have been proved, and that the error was therefore harmless.

From the Gibson Circuit Court.

C. A. Buskirk, for appellant.

L. C. Embree and T. R. Paxton, for appellees.

MITCHELL, J.—John and George W. Johnson commenced this suit to quiet their title as against a certain mortgage lien, which they alleged Joseph Jouchert was asserting against certain real estate owned by them in Gibson county.

An answer of general denial and a cross complaint were filed by Jouchert. The court sustained a demurrer to the cross complaint, to which ruling an exception was taken.

Subsequently, what are denominated as the third and fourth paragraphs of a cross complaint were filed. A demurrer was sustained to the third paragraph so filed.

The third and fourth paragraphs of the cross complaint are to be treated as an amended cross complaint. They superseded the second paragraph, which went out on demurrer. The exception to the ruling on that paragraph was waived by pleading over. *Hunter v. Pfeiffer, ante*, p. 197.

The third paragraph, as it is styled, presented, in substance, the following facts: On the 15th of January, 1884, Mrs. Grubbs, then a married woman, the wife of Thomas J. Grubbs, was the owner of the land in controversy, having inherited it from her deceased father. She negotiated a loan of money from Jouchert, with which to make improvements on certain other real estate, owned by her in her own right. In order to secure the payment of the loan so negotiated, it was mutually agreed between herself, her husband, and Jouchert, that Mrs. Grubbs should convey the real estate in question to her husband, that he should execute his notes to Jouchert, and that Mrs. Grubbs and her husband should join in a mort-

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gage on the land so conveyed to the latter. This was accordingly done. Mrs. Grubbs made a conveyance directly to her husband, who thereupon executed his notes payable in a bank in this State for the amount of the loan. These were secured by a mortgage, in which both joined, covering the land in controversy. It is alleged that the whole consideration of the loan was received by Mrs. Grubbs, and that her husband received no part thereof.

Subsequently, Grubbs and wife conveyed the land thus mortgaged to the Johnsons, who took it with both actual and constructive notice of all the facts.

The propriety of the ruling of the court, in sustaining the demurrer to the third paragraph of the cross complaint, presents the chief, if not the only, question for decision.

In support of the ruling of the court below, it is argued on behalf of the appellee :

1. That the averments, contained in the cross complaint, in respect to the wife having negotiated and received the exclusive benefit of the loan, are surplusage, in that they merely anticipate the defence of coverture ; hence, it is said, they are not to be regarded as substantive, issuable averments, properly in the complaint.

2. The husband having given his notes payable at a bank in this State, the debt of the wife, arising out of the loan and receipt of the money by her, was, the appellees contend, presumptively paid and extinguished by the delivery and acceptance of the husband's notes ; hence, it is said, the averments in respect to the loan having been negotiated by and for the benefit of the wife, are immaterial, and are to be rejected as tending to contradict the notes, and vary the recitals written in the mortgage.

In respect to the first proposition : The cross complainant was seeking to maintain and enforce a mortgage lien against real estate, the title to which was in a married woman, at the time the mortgage was executed. The mortgage recited on its face that it was given to secure certain notes executed by

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the husband. Presumptively, the notes having been given by the husband, the debt which they evidenced was also the husband's. It having been averred that the land mortgaged was the separate estate of the wife, and it appearing that the conveyance, made concurrently with the mortgage by the wife to the husband, was such as in no wise affected her title, it was not only proper, but absolutely necessary, that the complaint should show that the debt secured by the mortgage was one which the wife had herself contracted, and that it was such a debt as was within her power to contract, by reason of the fact that it inured to her benefit, or to the benefit of her estate.

Whenever it appears on the face of a complaint that the purpose of the suit is to affect the separate estate of a married woman, through a contract made with her during her coverture, it must also affirmatively appear that the contract through which her estate is thus sought to be affected, was one which she had the power to make. *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213.

Where a contract is declared on, and the complaint on its face does not necessarily disclose whether or not such contract was executed by a *feme covert*, it ordinarily becomes a matter of defence, that a married woman should set up her coverture. When she alleges that at the time the contract sued on was made she was a *feme covert*, the burden is then cast upon the plaintiff to reply such a state of facts as renders her liable notwithstanding that she was under coverture when the contract was executed.

In the case we are considering, it appeared on the face of the complaint in question, that the mortgage was executed by a married woman, and that it affected her separate property. It was, therefore, essential that it should be made to appear that the debt, which the mortgage was given to secure, was contracted by the wife, and that it inured either to her personal benefit or to the benefit of her estate.

Concerning the second proposition, that the mortgagee is

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concluded by the acceptance of the commercial note of the husband, from averring and proving that the debt was contracted by and for the benefit of the wife, the conclusion insisted upon does not follow.

That the giving of a note, governed by the law merchant, either by the debtor or by a third person, is presumptively an extinguishment of an antecedent debt, is thoroughly settled. This principle can have very little, if any, application to a case where the debt and the securities given for its repayment arise out of one and the same contemporaneous transaction. In such a case, the whole transaction gives character to each separate part, and if one substantial part of the transaction would be nullified by attaching certain presumptions to another part of the same transaction, such presumptions will not be indulged.

The transaction is to be inspected in all its parts, and the intent of the parties, as discovered from all the circumstances, is to control in its interpretation. Thus it is uniformly held, that the presumption of payment, which ordinarily arises from the giving of a note governed by the law merchant, will be controlled when its effect would be to deprive the party who takes the note of a collateral security, or any other substantial benefit. In such cases the presumption of payment is rebutted by the circumstances of the transaction itself. 2 Daniel Neg. Inst., sections 1260, 1266b, 1267; 2 Jones Mort., section 924; *Reeder v. Nay*, 95 Ind. 164.

The facts stated in the paragraph under consideration make it apparent beyond doubt that the debt secured by the mortgage was the debt of the wife. It was a debt which she had the power to contract, and for the security of which she had power to bind her separate estate. Having actually contracted for, received, and used the whole consideration, it remained her debt until it was actually paid, notwithstanding the note given by her husband.

With respect to contracts for her own benefit, or for the benefit of her estate, the power of a married woman is ple-

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nary. When it is distinctly shown that the transaction was of that character, her rights and liabilities are the same as if she were *sui juris*. *Fawcner v. Scottish American Mortgage Co.*, 107 Ind. 555; *Ward v. Berkshire Life Ins. Co.*, *ante*, p. 301.

In the case before us the wife contracted for, received and applied the loan to the benefit of her separate estate, the husband receiving no part of the consideration. She pledged her separate estate as security, by way of a mortgage, in which her husband joined. That her husband also gave his note as evidence of the debt, and as an additional security, did not tend to make her contract one of suretyship.

That the true relations which the parties sustained to the transaction may be proved, for the purpose of determining who received the consideration, is well settled. Such proof does not vary or contradict the writings. It does nothing more than to give them intelligent application to the subject-matter. *Singer M'f'g Co. v. Forsyth*, *ante*, p. 334.

The mortgage recites that it was given to secure the payment of certain notes therein described. The averments in the cross complaint in no way tend to vary or contradict those recitals. They only go to show whose debt was evidenced by the notes, with a view to maintain the validity of the mortgage, by making it clear that the debt was that of the mortgagor, Mrs. Grubbs, and that her contract was therefore not within the prohibition of section 5119.

That the mortgage contained no agreement to pay the debt, in no wise affected the question. The controlling facts are, that it distinctly and unequivocally appears that the wife contracted for and received the exclusive benefit of the loan. Except as it is affected by the statute of limitations, a mortgage given to secure a debt so contracted has the same force and effect as a security, whether it contains an express promise to pay written therein or not.

Finally, it is argued, that even if the ruling of the court in sustaining the demurrer to the third paragraph of the cross

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complaint, was erroneous, it was a harmless error. This result, it is said, follows from the fact that under the fourth paragraph, all the facts set up in the third were susceptible of proof.

The fourth paragraph simply alleged the execution of the mortgage, to secure the indebtedness therein described as the indebtedness of Thomas J. Grubbs. It alleged that the mortgage was duly recorded, that it was due and unpaid, and that the Johnsons had actual notice of its existence when they purchased. To this it was answered that Mrs. Grubbs was, at the time she executed the mortgage, a married woman, and that the land mortgaged was her separate estate.

Inasmuch as the notes set out in the complaint were signed by the husband, so that they presumptively evidenced his debt, this was a sufficient answer. The record fails to disclose any reply whatever to the answer so filed.

The only reply which could have been made available, assuming the facts to be as they are set up in the third paragraph of the cross complaint, would have been one which presented substantially the same facts as those held insufficient on demurrer to that paragraph.

It can hardly be assumed, the court having held the facts therein stated insufficient to show that the debt was that of the wife, that a different ruling prevailed during the progress of the case. At all events, it does not affirmatively appear from the record that there was any other pleading in the case under which the same facts were admissible in evidence, or that such facts were admitted. Where an error is committed in sustaining a demurrer to a paragraph of complaint, in order to save a reversal, it must affirmatively appear that there was another paragraph under which the same facts might have been proved, and that such error was, on that account, harmless. It does not so appear in this case.

The judgment is therefore reversed, with costs.

Filed Dec. 14, 1886.

Osborn *et al.* v. Sutton *et al.*

No. 12,973.

OSBORN ET AL. v. SUTTON ET AL.

JURISDICTION.—*Failure to Enter Order Continuing Cause.*—Where jurisdiction is once acquired, it is not lost by the omission to enter orders continuing the cause.

FREE GRAVEL ROAD.—*Assessment Committee.*—*Report.*—*Time of Filing.*—*Notice.*—*Dismissal of Petition.*—As the statute relating to the establishment of free gravel roads does not require the committee appointed to make assessments of benefits to report at a fixed time, but does provide that the county auditor shall give notice of the filing of such report, mere delay in filing it is not sufficient ground for dismissing the petition.

SAME.—*Declaration of Jurisdiction.*—It is not necessary for the board of commissioners to enter a formal order declaring that it has jurisdiction, or that all jurisdictional facts have been shown. An order directing the establishment of the road, and appointing a committee to assess benefits, is a sufficient assertion of jurisdiction.

SAME.—*Competency of Committeeman.*—*Objection to.*—*Waiver.*—An objection to the competency of a member of the assessment committee must be made either at the time the committee is appointed, or within a reasonable time after the incompetency becomes known, or it will be deemed waived.

SAME.—*Sufficiency of Petition.*—*Delay in Questioning.*—It is too late to object that there is not a sufficient number of qualified petitioners, after the report of the viewers has been approved and the assessment committee appointed.

SAME.—*Vacancy in Assessment Committee.*—*How Filled.*—The board of commissioners have power to fill any vacancy that may occur in the assessment committee.

SAME.—*Indebtedness of County.*—*Statutory Limit.*—*Bonds.*—*Plea in Abatement.*—A remonstrance on the ground that the county is indebted beyond the limit allowed by the statute, and has therefore no power to issue bonds to pay for the proposed gravel road, is insufficient unless it is affirmatively made to appear that bonds are likely to be issued in violation of the law.

SAME.—*Locating Road on Land Appropriated for Public Ditch.*—*Remonstrance.*—A cause of remonstrance by land-owners affected by the proposed road, that it is located for a certain distance on land previously appropriated for a public ditch, is not, without more, sufficient.

SAME.—*Questions on Appeal.*—No question can be raised on appeal that is not presented to the board of commissioners.

PRACTICE.—*Objections Must be Specific.*—Objections must be specifically stated or they will not be considered.

From the Howard Circuit Court.

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M. Garrigus, J. E. Moore, M. Bell and W. C. Purdum, for appellants.

J. O'Brien, C. C. Shirley, J. F. Elliott and L. J. Kirkpatrick, for appellees.

ELLIOTT, C. J.—On the 11th day of March, 1882, the appellees petitioned the board of commissioners of Howard county to establish a free gravel road, and to direct an assessment of benefits and damages to be made. Viewers were thereupon appointed, and a report was made by them on the 14th day of June, 1882. On this report the proper order was made, and William Middleton, David Greeson, and William H. Conwell were appointed a committee to make the assessment.

On the 12th day of September, 1883, nine of the appellants appeared and moved the board to dismiss the petition and proceedings, assigning as the causes for the motion: *First*. That the petition was not signed by a majority of the resident land-holders, and that it was not so recited in the order. *Second*. That the order appointing the committee was made on the 7th day of June, 1882; that no entry of continuance was made, although three regular sessions of the board had been held in the interval between the time the motion was made and the order entered appointing the committee, and that changes were made in the ownership of lands during that period.

The petitioners moved to strike from the files the motion of the appellants, and the motion of appellees was sustained. There was no error in this ruling.

The board of commissioners did not lose jurisdiction of the cause by reason of the failure to enter an order continuing the proceedings. Where jurisdiction is once acquired, it is not lost by the omission to enter orders continuing the cause. *Stoddard v. Johnson*, 75 Ind. 20, see p. 34; *Black v. Thomson*, 107 Ind. 162.

Had there been no notice of the time fixed for the meeting

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of the viewers, or had the time fixed been disregarded, a very different question would have been presented. *Hobbs v. Board, etc.*, 103 Ind. 575. Here there was notice to the viewers, and they did meet at the time designated, but the committee appointed to make the assessments delayed reporting. If the statute required the committee to report at a fixed time, there would be much force in the contention of appellants, but there is no such provision in it. The statute directs that the report shall be filed with the auditor, and that he shall give notice of the time and place that the commissioners will meet to consider the report, thus giving an ample opportunity to the land-owners to be heard. R. S. 1881, section 5096. The case is, therefore, essentially different from those in which the statute directs that the report of assessors shall be made at a designated time, so that the cases of *Hobbs v. Board, etc.*, *supra*, and *Claybaugh v. Baltimore, etc.*, *R. W. Co.*, *ante*, p. 262, are not in point.

It was not necessary for the board of commissioners to enter a formal order declaring that it had jurisdiction of the case, or that all jurisdictional facts had been shown. A general order or judgment is a sufficient declaration of jurisdiction, for the assumption of authority is an assertion of jurisdiction without any formal statement of the facts essential to give jurisdiction. *Cauldwell v. Curry*, 93 Ind. 363; *Platter v. Board, etc.*, 103 Ind. 360; *Carr v. State, etc.*, 103 Ind. 548; *Jackson v. State, etc.*, 104 Ind. 516; *Pickering v. State, etc.*, 106 Ind. 228.

Here there is a recital of many of the essential facts, and an order directing the establishment of the road, and appointing a committee to assess benefits, so that it is quite clear that the order sufficiently asserts jurisdiction.

Where, in cases like the present, the land-owner is entitled to notice of the filing of the report of the committee appointed to assess benefits, he is not, at all events, entitled to a dismissal of the petition because of a delay of the committee in making the report. *Updegraff v. Palmer*, 107

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Ind. 181. Whether the delay might, or might not, be made the basis of an exception to the report, is not here the question, for the question here is, will such an objection sustain a motion to dismiss the petition?

The section of the statute we have referred to gives the land-owner ample opportunity to except to the report, but it does not enable him to secure a dismissal of the petition by an objection based on the action or non-action of the committee.

The committee to assess benefits was appointed on the 9th day of June, 1882, and no objection was made to the competency of its members until January 25th, 1884, when the appellants objected to the competency of two of them, on the ground that they had been viewers under the order of the board; but, in the same motion, they objected to the appointment of a new committee. We think that there was no error in overruling the appellants' objections. One reason for this is, that they assumed inconsistent positions—one effectually destroying the other. The old maxim, "He is not to be heard who alleges things contradictory to each other," applies here with full force. Another reason is, that the objection came too late; it should have been made at the time the committee was appointed, or at least within a reasonable time after the appellants had knowledge of the alleged incompetency of the committee. *Smith v. Smith*, 97 Ind. 273; *Carr v. State*, etc., *supra*; *Updegraff v. Palmer*, *supra*.

The principle here involved is the same as that which prevails respecting the empanelling of juries, for the objection must be presented at the time the jury is selected, or at the time it becomes known, or it will be deemed waived. *Shular v. State*, 105 Ind. 289 (55 Am. R. 211). It is, therefore, not necessary to decide whether the members of the committee objected to were or were not competent.

The objection that the petition was not subscribed by the requisite number of freeholders, can not be successfully made after the board of commissioners has adjudicated that ques-

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tion. It was adjudicated in this case after notice to the appellants, and it was too late to present the objection, that there was not a sufficient number of qualified petitioners, after the report of the viewers had been approved and the committee appointed. *Updegraff v. Palmer*, *supra*, and cases cited; *Forsythe v. Kreuter*, 100 Ind. 27; *Washington Ice Co. v. Lay*, 103 Ind. 48; *Breitweiser v. Fuhrman*, 88 Ind. 28, and cases cited; *Little v. Thompson*, 24 Ind. 146.

There was no error in appointing a member of the committee to take the place of one of the original members, rendered incapable of serving on account of physical infirmities. The statute invests the board of commissioners with general jurisdiction of the subject of free gravel roads, and, while the authority is a statutory one, it is broad enough to enable the board to substitute a committeeman in case of a vacancy. *McMullen v. State, ex rel.*, 105 Ind. 334. It was not intended by the Legislature that the whole proceedings should fail because of the illness or death of one of the committeemen, but the power to fill vacancies is necessarily implied in the broad grant of express powers contained in the statute.

Some of the objections to the petition and proceedings are stated in very general terms, and it is enough to say of them that they are not sufficiently specific to present any questions for our consideration. It is established by our decisions that objections must be specifically stated, or they will be disregarded. *Updegraff v. Palmer*, *supra*; *Meranda v. Spurlin*, 100 Ind. 380; *Higbee v. Peed*, 98 Ind. 420; *Anderson v. Baker*, 98 Ind. 587.

We agree with the counsel for the appellees that no question can be raised on appeal that was not presented to the board of commissioners. *Thayer v. Burger*, 100 Ind. 262; *Clift v. Brown*, 95 Ind. 53; *Lowe v. Ryan*, 94 Ind. 450; *Green v. Elliott*, 86 Ind. 53, and cases cited.

This principle disposes of some of the questions argued, but not all of them. It does not dispose of the question sought to be made as to the authority of the board to issue

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bonds to pay for the proposed improvement, and that subject requires consideration for the reason, if for no other, that it was brought to the attention of the board.

The third paragraph of the remonstrance avers, in substance, that the county has no power to issue bonds to pay for the proposed gravel road, for the reason that it is indebted beyond the limit allowed by the statute. Waiving the question whether bonds issued under the gravel road law can be deemed an indebtedness of the county within the meaning of the law, and waiving, also, the question as to whether an issue of that character can be formed in such a proceeding as this, we think the case must, nevertheless, be decided against the appellants. It does not appear that the board intends to pay for the improvement in bonds or otherwise than with the proceeds of the tax as it may be collected, nor does it appear that the board may not fully discharge all of its indebtedness before it becomes necessary to incur any indebtedness for the construction of the gravel road. Where, as here, a plea is filed in the nature of a plea in abatement, it should be made to affirmatively appear that the officers are likely to violate their obligations by doing what it is claimed the law forbids.

The fifth paragraph of the remonstrance alleges that the proposed road is located for the distance of two miles on land previously appropriated for a public ditch, but it does not aver that the ditch will be interfered with by the construction of the road. We do not think that this cause of remonstrance is sufficient, for the statute confers upon the board authority to make all necessary and proper changes in the line of the proposed road. *R. S. 1881, section 5095; Million v. Board, etc.*, 89 Ind. 5, see p. 16. We can not hold that such a change might not be made if required, but, on the contrary, must presume that the officers will do their duty. But, if it were otherwise, we can not perceive that the land-owners will be injured if the ditch is taken, for only those interested in the existence of the ditch can com-

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plain. Nor can we say, as matter of law, that the gravel road if built will interfere with the ditch. If the remonstrants desired to show that both the ditch and the road could not occupy the same right of way without conflict, they should have made their remonstrance much more specific. The cases of *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486, and *Dwenger v. Chicago, etc., R. W. Co.*, 98 Ind. 153, do not apply, for the reason that there the complainants were those whose rights were directly invaded, while here the rights of the parties who complain have not been invaded, nor does it appear that the board of commissioners may not, in the lawful exercise of the authority conferred upon it, direct a change to be made, if one is necessary, that will obviate all objections.

The judgment in this case was rendered on the 11th day of April, 1885, and, as this was prior to the time the act of April 8th, 1885, took effect, it is not necessary to decide whether that act repealed all previous laws or not, for a final judgment can not be affected by the repeal of the statute under which it was rendered.

Judgment affirmed.

Filed Dec. 14, 1886.

No. 12,299.

THE BOARD OF COMMISSIONERS OF TIPTON COUNTY v. KIMBERLIN.

COUNTY COMMISSIONERS.—*Right to Sue for Moneys Due County.—Settlement with Treasurer.—Mistake.*—An action against a former county treasurer individually to recover moneys due from him to the county, by reason of a mistake on the part of the county whereby he had been given credit on final settlement for county orders which had been previously redeemed and for which he had been given full credit in other settle-

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ments, may properly be brought by and in the name of the board of county commissioners. Section 6506, R. S. 1881, providing that actions shall be brought by the State, on the relation of State and county auditors, in certain cases, does not apply.

PLEADING.—Demurrer.—Capacity to Sue.—The cause for demurrer, that "the plaintiff has not legal capacity to sue," has reference only to some legal disability, such as infancy or insanity, and not to the fact that the complaint fails to show a right of action in the plaintiff.

From the Clinton Circuit Court.

G. H. Gifford and *S. O. Bayless*, for appellant.

J. O'Brien, *C. C. Shirley*, *T. H. Palmer* and *W. F. Palmer*, for appellee.

Howk, J.—In this case the court sustained the demurrers of appellee Kimberlin, the defendant below, to each of the six paragraphs of appellant's complaint. Appellant excepted to these rulings, and failing to amend or plead further, judgment was rendered, that appellant take nothing by its suit, and that appellee recover his costs.

Appellant has here assigned, as separate errors, the sustaining of appellee's demurrers to each of the six paragraphs of its complaint.

The suit was commenced by appellant in the Tipton Circuit Court; but, before any ruling or decision was made therein, Tipton county being an interested party to the suit, by agreement of the parties the venue of the cause was changed to the court below. As originally filed, appellant's complaint contained four paragraphs, to each of which appellee demurred for the following causes, namely:

1. Because neither of the four paragraphs stated facts sufficient to constitute a cause of action; and,
2. Because the appellant had no legal capacity to bring and maintain the suit, set forth in each of the four paragraphs of its original complaint.

These demurrers were sustained by the court to each of such four paragraphs of complaint. Thereupon the appellant filed its additional fifth and sixth paragraphs of complaint;

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to each of which additional paragraphs appellee demurred, assigning, substantially, the same causes of demurrer as in his demurrer to the several paragraphs of the original complaint. The demurrers to the additional fifth and sixth paragraphs of complaint were also sustained by the court.

With this statement of the rulings of the circuit court, as shown by the record of this cause, we proceed now to the consideration and decision of the questions in the case, discussed by appellant's counsel.

In the first paragraph of its complaint appellant first showed by proper averments that appellee Kimberlin was the duly elected, qualified and acting treasurer of Tipton county for two successive official terms, or during a period of four years, commencing on the 17th day of August, 1875, and continuing to and ending on the 17th day of August, 1879. And appellant averred that, at the times required by law, appellee made his settlements with the auditor of such county, and, when he retired from office, he attempted to make a final settlement of his official matters with such auditor and appellant; that afterwards it was discovered that there was a mistake in the last mentioned settlement, and on the 9th day of March, 1880, the appellee and appellant settled and adjusted the amount due from appellee to Tipton county, which amount was found to be \$8,000; that, at that date, appellee presented to the treasurer of Tipton county and the appellant certain county orders, which had been redeemed and paid by him while in office, and demanded that Tipton county should redeem such orders and take them in payment of the amount found due; upon such settlement, to such county; that appellant and such treasurer, believing that such orders had never been redeemed, and were a just and due demand or debt against such county, accepted such orders in payment of such balance found due such county as aforesaid.

And appellant averred that the county orders aforesaid, instead of being genuine claims and debts against such county, had been fully redeemed and paid by the county, long before

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such last settlement, to wit, on the — day of November, 1875; that each and all of such county orders had been redeemed and paid by the appellee Kimberlin, and that in each of his settlements with such county he had charged the county with such orders, and each of them, and a list and description of such orders, marked "Exhibit A," were filed with and made part of such paragraph of complaint; and that the amount of such orders, so paid by mistake, was \$8,000. Wherefore appellant said that appellee was indebted to appellant in the sum of \$8,000, etc.

We will consider the grounds of appellee's demurrer to the foregoing paragraph of complaint, in the inverse order of their statement. Under our statute, providing for the organization of a board of commissioners, in each county in this State, for the transaction of county business, it will not do to say, we think, that such a board has not the legal capacity to sue, or to bring and maintain any suit or action, in its corporate name, for the enforcement of any cause of action it may have against any party or person, in any court of competent jurisdiction. By the express terms of section 5735, R. S. 1881, in force since May 6th, 1853, it is declared that such a board shall be "a body corporate and politic," by a specified corporate name, "and as such, and in such name, may prosecute and defend suits," etc. Besides, it has always been held by this court, that the *second* statutory cause for demurrer to a complaint, *namely*, "that the plaintiff has not legal capacity to sue," has reference only to some legal disability of the plaintiff, such as infancy, insanity or idiocy, and not the fact, if it be the fact, that the complaint on its face fails to show any cause or right of action in the plaintiff. *Dale v. Thomas*, 67 Ind. 570; *Dewey v. State, ex rel.*, 91 Ind. 173; *Traylor v. Dykins*, 91 Ind. 229.

But we have often held, and correctly so we think, that a demurrer to a complaint for the *fifth* statutory cause of demurrer, *namely*, "that the complaint does not state facts sufficient to constitute a cause of action" (section 339, R. S.

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1881), calls in question not only the sufficiency of the facts stated to constitute a cause of action, but also the right or authority of the particular plaintiff to bring and maintain a suit upon such cause of action. *Pence v. Aughe*, 101 Ind. 317; *Wilson v. Galey*, 103 Ind. 257; *Walker v. Heller*, 104 Ind. 327; *Frazer v. State, etc.*, 106 Ind. 471.

It is too clear for argument, as it seems to us, that the facts stated in the first paragraph of complaint herein, the substance of which we have heretofore given, are amply sufficient to constitute a cause of action against appellee, in favor of some person or party. Indeed, we think that if the same facts had been presented to the proper court, at the proper time, in proper form, and by competent authority, they would have been amply sufficient to constitute a charge of felony against the appellee. It is not claimed on behalf of appellee, that the facts stated are not sufficient to constitute a cause of action against him; but his learned counsel vigorously insist that appellant is not the proper plaintiff to bring or maintain a suit, in its own name, upon such cause of action. They base their argument of this question upon the provisions of section 6506, R. S. 1881. In that section it is made the duty of a county treasurer to "pay over all the revenues collected for county, road, and other purposes, and make settlements therefor, at the times and in the manner by this act required;" and it is then declared that, "upon failure or refusal to do so, he and his sureties on his official bond shall be held liable to pay the full amount which he should have paid over, together with interest and ten per centum damages. Such suit, if for State revenue, shall be brought by the attorney general, in the name of the State of Indiana, on the relation of the auditor of state, upon the written request of the auditor of state; and if for county, road, or for any other purpose, it shall be brought by the prosecuting attorney, in the name of the State of Indiana, on the relation of the county auditor, upon the written request

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of the county auditor or upon the order of the board of county commissioners."

We are of opinion that these statutory provisions have no application whatever, direct or analogous, to the case stated in appellant's complaint against the appellee. This is not a suit on the official bond of appellee, as the former treasurer of Tipton county; and therefore the suit would have been improperly brought, if brought in the name of the State of Indiana, or upon the relation of either the auditor of state or county auditor. The case stated in the complaint is one not contemplated in any of the legislation concerning our State or local revenues, and, to the credit of ordinary official integrity, it is one not likely to occur often. If the case stated in the complaint be true, and, as it is now presented here, its truth is admitted by appellee, it is certain the appellee is indebted to Tipton county for moneys belonging to such county; and it is equally certain, we think, that appellant is the proper plaintiff to bring and wage a suit against appellee for the recovery of such moneys.

In each of the paragraphs of its complaint, original and additional, appellant has sued appellee upon substantially the same cause of action, but has stated the facts constituting such cause of action, in different order and phraseology in the different paragraphs. What we have said, therefore, in considering appellee's demurrer to the first paragraph, is equally applicable to the other paragraphs of appellant's complaint. We are clearly of opinion that the court below erred in sustaining appellee's demurrers to each paragraph of appellant's complaint herein.

The judgment is reversed with costs, and the cause is remanded with instructions to overrule the demurrers to each paragraph of complaint, and for further proceedings in accordance with this opinion.

Filed Dec. 14, 1886.

Conlee v. Wright.

No. 12,604.

CONLEE v. WRIGHT.

EVIDENCE.—*Weight of.*—*Attorney and Client.*—*Agency.*—*Breach of Trust.*—*Damages.*—*Real Estate.*—*Conveyance.*—Action for breach of trust and consequent damages, it being alleged in the complaint that the plaintiff had employed the defendant, an attorney, to purchase and get possession of a tract of land for him, and that he had acquired title and possession, but refused to convey to the plaintiff, and had conveyed to another person. The only question arises upon the evidence, and as it is conflicting the finding of the trial court will not be disturbed.

From the Harrison Circuit Court.

G. W. Denbo, W. N. Tracewell and R. J. Tracewell, for appellant.

N. R. Peckinpugh and H. C. Hays, for appellee.

NIBLACK, J.—Suit by John A. Conlee against Samuel J. Wright for an alleged breach of trust and consequent damages.

The complaint was in two paragraphs. The first charged that the plaintiff had employed the defendant, who was alleged to be a practicing lawyer, to purchase in, to acquire the title to, and to get possession of, a tract of land for him; that the defendant had so purchased in, acquired the title to, and obtained the possession of the land, but had failed and refused, and still failed and refused, to convey the same to the plaintiff. Wherefore the plaintiff demanded that a conveyance of the land should be decreed to him, and that damages should be awarded him for the defendant's detention of said land.

The second paragraph charged, substantially, the same facts, but in addition averred that the defendant had, in violation of his duty as agent and attorney, and of his contract with the plaintiff in the premises, conveyed the land to one Peter Lamb. Wherefore damages only were demanded.

There was a trial by the court, a finding for the defendant,

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and, over a motion for a new trial, a judgment in accordance with the finding.

Since this appeal was taken, Samuel J. Wright has died testate, and Mary E. Wright, the executrix of his will, has been substituted as appellee.

No question is made here either upon the form of the action or upon the character of the complaint. It is only claimed that the circuit court erred in overruling the motion for a new trial.

The undisputed facts upon which this case rests may be stated as follows:

On the 4th day of August, 1873, Conlee, the appellant, being the owner of a forty-acre tract of land in Harrison county, mortgaged it to the State to secure a loan of fifty dollars made to him out of the common school fund under the control of the auditor of said county of Harrison. On the 20th day of July, 1878, Conlee bargained and sold the same tract of land to Herman Schmidt and Louisa Schmidt, his wife, for the sum of \$400, on a credit of four years, the mortgage given as above to be assumed and paid as a part of the purchase-money, and executed to them a bond for a deed on payment of the purchase-price of the land. On the 1st day of March, 1881, at a sale of said land for delinquent taxes, one Josiah Locke became the purchaser of the same for the sum of \$17.66, the amount due thereon, including penalty, interest and costs, and received a proper certificate of his purchase. In February, 1883, Samuel J. Wright, herein above named, at the solicitation of Conlee, purchased this tax certificate of Locke and obtained an assignment thereof to himself. On the 30th day of March, 1883, Wright received a tax deed for the land in pursuance of the certificate and its assignment to him. The Schmidts being insolvent and unable to make good their purchase, and having in the meantime failed to pay the common school fund mortgage, or any part of the purchase-money, as they had agreed to do, the land in question was, on the 18th day of August, 1883, un-

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der the direction of the auditor of Harrison county, offered for sale for the payment of the mortgage, and the same was then bid off and sold to Wright for the sum of. \$65.05, and the auditor executed a deed to Wright, in pursuance and in confirmation of his purchase. At the September term, 1883, Wright recovered a judgment against the Schmidts for the possession of the land and quieting his title thereto as against them. On the 17th day of March, 1884, Wright sold and conveyed the land to Peter Lamb in consideration of the sum of \$155. A short time before this suit was instituted Conlee tendered to Wright \$130 in lawful money of the United States, claiming that the sum thus tendered was sufficient to reimburse the latter for all the money expended and services performed concerning the land in controversy.

Conlee testified that previous to February, 1883, Wright had been his attorney, and that when in that month he requested the latter to purchase the certificate of the tax sale, he employed him as an attorney to make the purchase; also, to buy in the land at a contemplated sale on the mortgage and to get possession under a clear title; that Wright was then to hold the land for him until he could obtain money sufficient to redeem it; that upon his repaying Wright all the money he might be required to advance, with interest, and the payment in addition of a reasonable attorney's fee, the latter was to convey the land back to him; that, in brief, Wright's entire connection with the land was as his, Conlee's, attorney and agent, and in his interest.

Wright was also called as a witness, and, as such, denied that he ever had been Conlee's attorney, or that he had acted in that capacity in the proceedings which he took to acquire title to and possession of the land in dispute. He also asserted, in effect, that he consented to purchase the tax certificate, and did so purchase it, merely to oblige Conlee and to afford him further time in which he might redeem the land from the tax sale; that, at the time he purchased the tax certifi-

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cate, he did not know that there was a mortgage upon the land; that when a few weeks later he became aware of the existence of the mortgage, he resolved, at his own suggestion, to have the land sold on the mortgage and to buy it in to protect his interest derived from his purchase of the tax title, and that he so informed Conlee at the first opportunity; that in view of all the circumstances, he had promised Conlee to give him an opportunity to repurchase the land, and that he would give him a preference in that respect; that to that end he held the land for several months after his title to it was quieted; that after having awaited Conlee's pleasure in the matter for a reasonable time, and as long as his personal convenience would permit, he sold the land to Peter Lamb as has been above stated.

Some facts and circumstances were brought out by the evidence which corroborate the testimony of Conlee in some material respects and tended very strongly to sustain the theory upon which the suit was prosecuted; but, as has been seen, the evidence was irreconcilably conflicting in some very essential particulars, and, as we are not permitted upon an appeal of this kind to weigh conflicting evidence, we are not at liberty to hold that the finding was not sustained by sufficient evidence.

The fact that Wright used only his own money in purchasing, and obtaining possession of, the land, constituted an element in the cause worthy of consideration at the trial. *Mitchell v. Colglazier*, 106 Ind. 464.

The judgment is affirmed, with costs.

Filed Dec. 15, 1886.

Neptune et al. v. Taylor et al.

No. 12,940.

NEPTUNE ET AL. v. TAYLOR ET AL.

FREE GRAVEL ROAD.—*County Commissioners.*—*Final Order.*—The final order by the board of commissioners, in a proceeding under the statute for the establishment of a free gravel road, is the order confirming the assessments of benefits made by the committee appointed for that purpose.

SAME.—*Appeal.*—*When Will Not Lie.*—An appeal will not lie in such a proceeding, from an order of the board rejecting a motion, made before the confirmation of the assessments, to vacate the orders approving the viewers' report and directing the improvement to be made.

From the Boone Circuit Court.

P. W. Dutch and *J. S. Tarkington*, for appellants.

C. S. Wesner and *C. M. Zion*, for appellees.

ZOLLARS, J.—On the 21st day of February, 1883, appellees filed a petition before the board of commissioners of Boone county, asking for the establishment and construction of a free gravel road, under sections 5091, *et seq.*, R. S. 1881. At the adjourned session in the following March, the board appointed viewers, with directions that they should make a view, and report at the ensuing September session. At that session a report was filed. The board approved it, and made an order that the improvement should be made. Nothing further seems to have been done until the September session of the board in 1885. At that session the board appointed a committee to apportion the estimated expenses upon the lands benefited. That committee performed their work, and made and filed their report.

Before the board had confirmed or taken any action upon the report, appellants filed a written motion asking the board to set aside and vacate the order approving the report of the viewers in 1883, and the order directing the improvement to be made, with all proceedings subsequently had thereon.

In that motion it was charged that fraud was practiced in procuring signers to the original petition; that but one of the

108	459
126	171
108	459
131	336
108	459
124	701
108	459
153	259

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viewers appointed signed the report, participated in the view, and in making the report; that a large amount of land was omitted from the report that would be benefited by the improvement; that the order for the improvement was insufficient, and made without authority, because the petition had not been signed, as required by section 5095 of the statute, by a majority of the resident land-owners whose lands were reported as likely to be benefited by the improvement, and by the owners of a majority of the whole number of acres of land that would likely be so benefited; and that the board had taken no action in the matter from the September session in 1883, until the September session in 1885. On motion of appellees, some of the original petitioners, appellants' above motion was struck out and rejected by the board. At once, and before the board had confirmed or acted upon the report of the committee, or taken any further action in the matter, appellants appealed to the circuit court. In that court appellees again moved the court to strike out and reject appellants' motion. The court sustained the motion, and "dismissed the cause," at appellants' costs.

Without entering upon the merits of the case, we may say, that appellants' motion charges very serious irregularities and defects in the proceedings before the board. Whether enough is charged and shown by the record filed with the motion, to render the whole proceeding void, is a question we do not now decide, because, as we have been constrained to hold, it is not before us.

The final order by the county board, in a proceeding of this character under the statute, is the order confirming the assessments of benefits made by the committee, appointed as required by section 5096 of the statute. *Gavin v. Board, etc.*, 104 Ind. 201; *Kirkpatrick v. Pearce*, 107 Ind. 521. See, also, *Scott v. Board, etc.*, 101 Ind. 42.

That is the order that fixes the assessments, from which the means to construct the road are to be derived, and makes them liens upon the lands assessed. Until that order is made,

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the assessments made by the committee are not liens upon the lands, nor otherwise binding upon any one, and the road can not be constructed.

The board may accept and confirm the assessments made by the committee, or they may not. Under section 5096 they have authority, upon exceptions filed, to change the assessments, or refer the same to a new committee.

At the time appellants filed their motion, it could not be known that the board would confirm the report of the committee, assessing benefits, nor does the record before us show that that report has ever been confirmed. Appellants had the undoubted right to file exceptions to the report, and demand a change in the assessments, or a new assessment by a new committee. Possibly, if they had done so, their lands might have been relieved of all assessments. Had they filed such exceptions, and assessments against their lands had been confirmed, clearly they would have had a right to appeal from the order of confirmation, because it would have been the final order disposing of the whole matter before the board. If, then, they may appeal from the order of the board striking out and rejecting their motion, they may have two appeals in the same proceeding, subsequent to the report of the committee. This, we think, would be unreasonable, and not within the provisions of the statute allowing appeals from commissioners' courts. The action of the board in rejecting the motion was not a final decision in the matter pending before the board, nor such a decision as might be appealed from. Appellants' motion was in the nature of a pleading in a case.

The striking out of a pleading is not such a decision in a case as may be appealed from. Clearly, the striking out of the motion in this case is no more a decision that may be appealed from than an order of the board appointing viewers in a highway case. In such a case it has been held, as stated in the syllabus in the case of *Freshour v. Logansport, etc., T. P. Co.*, 104 Ind. 463, that "An appeal to the circuit court will not lie from an order of the county commissioners ap-

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pointing viewers to report upon the public utility of a proposed highway, and when taken it should be dismissed summarily. A proceeding for the location of a highway remains under the jurisdiction of the county commissioners until by some order or decision it is substantially ended." So, in this case, it may be said that the circuit court might have summarily dismissed the appeal.

Appellees did not move a dismissal of the appeal, in the circuit court, but the sustaining of their motion amounted, practically, to the same thing.

In law and in fact, the ruling and judgment of the court were, in effect, a dismissal of the appeal, and thus a right result was reached. *Logan v. Kiser*, 25 Ind. 393.

It results from the foregoing, that the judgment of the court below must be affirmed.

Judgment affirmed, with costs.

Filed Oct. 6, 1886; petition for a rehearing overruled Dec. 15, 1886.

108	408
187	509
108	408
180	42

108	408
4157	663

No. 13,363.

HENDERSON ET AL. v. PIERCE ET AL.

VOLUNTARY ASSIGNMENT.—*Preference of Creditors.*—A debtor who makes a voluntary assignment, under the statute, of all his property for the benefit of all his creditors, can not prefer certain of his creditors by providing in the deed of assignment that they shall be first paid in full, and, after they are so paid, that all others shall be paid ratably.

SAME.—*Deed of Assignment Invalid in Part.*—Where a deed of assignment, made in good faith, in pursuance of the statute regulating assignments for the benefit of creditors, directs that certain creditors be preferred, it may be adjudged invalid in so far as it makes provision for preferences, and upheld as a valid general assignment for the benefit of all the assignor's creditors.

SAME.—*When Deed Fraudulent on Face.*—In order to render a deed of assignment fraudulent on its face, it must contain some provision in

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direct conflict with an established rule or requirement of law, or which is expressly, or by necessary inference, intended to hinder, delay or defraud creditors.

SAME.—*Deed Not Actually Fraudulent Upheld Notwithstanding Invalid Provisions.*—Where it is apparent from the whole scope and tenor of a deed of assignment, that the debtor in good faith intended to resort to the assignment law, and has made an assignment of all his property for the benefit of all his creditors, but has inserted in the deed stipulations which are constructively invalid, such assignment, if not actually fraudulent, will stand, while the invalid provisions will be controlled by the statute governing assignments.

From the Clinton Circuit Court.

J. C. Suit, W. D. Bynum, A. T. Beck, S. O. Bayless and W. H. Russell, for appellants.

H. W. Chase, F. S. Chase and F. W. Chase, for appellees.

MITCHELL, J.—On the 26th day of May, 1885, David B. Henderson, being financially embarrassed and in failing circumstances, made an assignment of all his real and personal property, including choses in action, in trust for the benefit of all his *bona fide* creditors. The total value of the property assigned is alleged in the complaint to have been \$12,000, while the amount of the assignor's liabilities is stated at \$16,000.

In the deed of assignment, the assignor's creditors are divided into two classes, and the assignee therein appointed is directed to pay those who are designated as of the first class in full, after which those who are described as belonging to the second class are to be paid ratably and in accordance with the statute regulating voluntary assignments.

In all other respects the assignment is in the usual form, and the requisite steps to make it effective under the act providing for voluntary assignments for the benefit of creditors, appear to have been taken.

The appellees, who are wholesale merchants doing business under the firm name of O. W. Pierce & Co., in the city of Lafayette, Indiana, commenced this suit in June, 1885. They allege in their complaint, that the assignor, at the time of

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making the assignment, was indebted to them for merchandise in a sum amounting in all to \$7,429.60, and that they had been designated as creditors of the second class. Those creditors who are named in the deed of assignment as belonging to the first class, together with the assignor and assignee, are made defendants.

An amended complaint charged further, that after the filing of the original complaint, the assignor, for the purpose of effectuating an unjust preference, in the event that the assignment, which was attacked by the original complaint, should be adjudged void because of the preferences therein provided for, had voluntarily confessed judgments in the Clinton Circuit Court, in favor of the creditors of the first class who are defendants in that behalf, which judgments aggregated \$6,140.13 besides costs.

The complaint further alleges, that the assignment in so far as it divides the assignor's creditors into two classes, and requires the assignee to pay those of the first class in full, before paying those of the second class anything, is fraudulent and void as against the complainants and all other creditors not of the first class.

Prayer that the assignment be adjudged a general assignment for the benefit of all the creditors of the assignor, and that the assignee be ordered to convert the assets into money, and, after paying the necessary expenses of the trust, divide the proceeds ratably and without preference among all the creditors.

There was a motion to strike out certain designated parts of the complaint. The defendants also separately demurred to the complaint for want of sufficient facts.

By agreement the motion to strike out and the demurrer were considered together. The learned judge before whom the hearing was had, having taken the motion and demurrer under advisement, resumed the bench on the 6th day of July, 1886, for the purpose of announcing his ruling on the questions submitted. Thereupon H. A. Stephens & Co., by an

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intervening petition, became parties to the proceeding, and filed what is designated as a cross complaint. In this the facts in reference to the assignment are stated substantially as in the complaint filed by the plaintiffs.

The cross complainants further allege that they are also creditors of the assignor, of the second class, and that they had recovered a judgment on their claim on July 18th, 1885, which was after the judgments had been confessed in favor of the defendants. They charge that the assignment is fraudulent and void, and ask that it be so adjudged and set aside.

The appellees, plaintiffs below, demurred to the cross complaint. This demurrer was sustained, the court at the same time overruling the motion to strike out, and the demurrer to the complaint. A decree followed, the effect of which was to adjudge that the assignment was to be administered for the equal benefit of all the assignor's creditors.

These rulings are the subjects of discussion by counsel, and present the only questions for consideration by the court.

The questions for decision are comprehended in the statement of the following propositions:

1. Can a debtor, in failing circumstances, make a general assignment of all his property for the benefit of all his creditors, and effectually provide in the deed of assignment that certain enumerated creditors shall be first paid in full, and, after they are so paid, that all other creditors shall be paid ratably?

2. If a deed of assignment, made in pursuance of the statute regulating voluntary assignments for the benefit of creditors, directs that certain creditors be preferred, may the deed be adjudged invalid in so far as it makes provision for preferences, and yet upheld as a valid general assignment for the benefit of all the assignor's creditors?

In respect to the first proposition, the decision of this court, as clearly set forth in the opinion in the case of *Grubbs v. Morris*, 103 Ind. 166, must be regarded as foreclosing further

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discussion of that subject. The conclusion there reached makes it certain that whatever other methods a debtor may employ for the purpose of giving a preference to one or more of his creditors, he can not give such preference while proceeding under the statute which provides for voluntary assignments, and prescribes the method of proceeding thereunder. Under the law of this State, a debtor, though he be insolvent, may prefer one or more of his creditors by securing them, or by a sale of property to them, if such security or sale be given or made in good faith. See, also, *Lake Shore Banking Co. v. Fuller*, 1 Cent. R. 109.

Where, however, resort is had to the statute, its provisions, *ex proprio vigore*, draw all the assignor's property, whether such property is specifically mentioned in the schedule or not, into the custody of the court, to be administered by it, through the instrumentality of the assignee, for the equal benefit of all the assignor's creditors. *Hasseld v. Seyfort*, 105 Ind. 534.

Any attempt to prefer creditors, by a stipulation to that effect in the instrument or deed of assignment, or by omitting property therefrom for that purpose, will prove futile. This result follows, from a consideration of the general purpose and spirit of the statute, and especially from section 2662, which provides, in substance, that the assignment which a failing debtor may make shall be a general assignment of all his property, in trust for all his *bona fide* creditors, and that all assignments for such purpose, except as provided for in that act, shall be deemed fraudulent and void.

This brings us to the questions involved in the second proposition above stated.

That part of the deed which is supposed to render the assignment obnoxious, and bring it within the denunciation of the statute, is the following direction to the assignee: In that respect it provides that, "After deducting his reasonable charges," the assignee "shall * * * pay all my *bona fide* debts to the person or persons entitled to receive pay thereon, in

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manner following, that is to say: He shall pay the creditors hereinafter named, who are designated as creditors of the first class, their several claims against me in full, and after the payment in full of my debts due to my creditors of the first class, he shall pay all my other creditors, who are hereby designated as creditors of the second class, ratably and without distinction or preference, in accordance with an act of the Legislature of the State of Indiana, entitled 'An act providing for voluntary assignments of personal and real property in trust for the benefit of creditors,' approved March 5th, 1859."

This recital, as indeed the whole instrument, and the proceedings taken under it, so far as they had progressed, is persuasive of the fact that the parties to the deed were in good faith intending to proceed in conformity with the provisions of the act above referred to, as they understood its provisions.

If, therefore, the assignment is to be held fraudulent, it must be so held by construction of law, and not because any actual fraud was either committed, or, so far as appears upon the face of the deed, contemplated.

It is said, however, that the good faith of the parties, or whether or not actual fraud was contemplated, is of no moment. The argument is that the deed on its face provides for a preference of creditors, and is hence fraudulent and void in law.

The inquiry is, therefore, pertinent, whether a literal and rigid construction should be applied to that part of the stipulation which directs payments to be made in full to the creditors designated as belonging to the first class, or whether the whole stipulation, when read, should be construed to mean that creditors were to be paid in accordance with the provisions of the voluntary assignment act therein referred to.

Was it the purpose of the assignor, that the directions in respect to payment and preferences of creditors were to be carried out in defiance of the law governing statutory as-

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signments, or did he intend that such payments were to be made in compliance with the act, the provisions and benefits of which he invoked?

Upon full consideration of the authorities on the subject, we are constrained to adopt the latter view.

In *Palmer v. Mason*, 42 Mich. 146, a rule which meets our approval is stated thus: "A transfer for the benefit of creditors, or by way of security, will not be adjudged fraudulent, as a conclusion of law drawn from the frame of the instrument, unless that construction is a necessary result in view of its peculiar shape and scope. Wherever the case will permit it, the court, in construing the paper, will ascribe an honest purpose and infer a lawful disposition."

This is but the statement of a well settled general rule, applicable to deeds of assignment as well as to all other conveyances, which requires that the meaning and intention of the assignor are to be collected from the whole instrument, and where two different constructions are possible, that is to be preferred which gives effect to, rather than that which annuls, the instrument. *Gano v. Aldridge*, 27 Ind. 294; *Spencer v. Robbins*, 106 Ind. 580; *Coyne v. Weaver*, 84 N. Y. 386; *Burrill Assignments*, pp. 456-7, 511-530.

It is to be observed that the act in relation to voluntary assignments does not in terms forbid the giving of preferences to creditors; that such preferences are not authorized results from construction.

At the time the assignment under consideration was executed, the case of *Grubbs v. Morris*, *supra*, had not been decided, and prior to that decision no authoritative construction denying the right to make preferences in general assignments had been directly given the voluntary assignment act. It may readily be supposed that it was a question in the mind of the assignor whether or not such preferences as were directed in the deed were authorized; hence the qualifying words that the assignee should pay thus and so, in accordance with the provisions of the act governing voluntary as-

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signments. If the assignor had entertained any other purpose than that of making a general assignment in strict compliance with the law, it is difficult to conceive why he should have appealed to the statute, and directed that payments should be made in accordance therewith.

Moreover, if any unlawful or fraudulent purpose was contemplated, it is not less difficult to apprehend the manner in which that end was to be accomplished, by expressly invoking the provisions of a statute which brought all his property under the immediate jurisdiction of the court, to be distributed as the law provides.

It is therefore apparent from a fair interpretation of the whole instrument, that it was not intended to create a trust, which should be administered in a manner different from that prescribed by the statute.

As a matter of course, the fraudulent character of an assignment can not be made to depend upon the opinion of the assignor, as to whether particular acts done by him, or required by the deed to be done by the assignee, are fraudulent or not; nor will a deed of assignment, which carries vice, and violation of the statute, upon its face, be rescued by the good intentions of the assignor. Unless, however, the deed contains provisions which are fraudulent *per se*, the assignment is not to be condemned *in toto* without proof of actual fraud.

Many examples might be given which illustrate the character of provisions, such as reader deeds of assignment fraudulent on their face. It is sufficient to say generally, in order to have that effect, the better view seems to be that the instrument must contain some provision in direct conflict with some established rule or requirement of law, or which is expressly, or by necessary inference, intended to hinder, delay or defraud creditors. Burrill Assignments, p. 514.

If to carry out the provisions of the deed of assignment, according to the necessary intent and meaning of the assignor, as therein disclosed, would involve the assignee in the viola-

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tion of some express requirement of the statute governing voluntary assignments, the irresistible conclusion would be, that such a deed was fraudulent in law. Such an instrument is not cured by the operation of the assignment law. *Keevil v. Donaldson*, 20 Kan. 165.

It is, therefore, important to remember, that the giving of preferences to creditors is, as we have already seen, not in contravention of the common law policy of the State, and that it is only by construction of law that the giving of such preferences is held to be unauthorized by the statute governing assignments for the benefit of creditors.* This being so, it can not be maintained that a single provision in a deed, made professedly to effectuate a statutory assignment, which is invalid by construction only, so poisons the whole assignment as to render it fraudulent *per se*, notwithstanding the matter provided for is lawful according to the general policy of the State, and not in contravention of any express requirement of the assignment law.

In conclusion upon this branch of the discussion, this general proposition may be stated as being within the authorities: When it is apparent from the whole scope and tenor of a deed of assignment, that a debtor, in embarrassed or failing circumstances, in good faith intended to resort to the assignment law, and has in pursuance of such purpose made an assignment of all his property for the benefit of all his creditors, but in carrying out such purpose has introduced into the deed requirements which, while not in conflict with some express provision of law, and not requiring that any such provisions of the law be disregarded, are nevertheless constructively invalid, such assignment, if not actually fraudulent, will stand, while the invalid requirement or stipulation will be nullified and controlled by operation of the statute governing voluntary assignments. *Burrill Assignments*, sections 352-354, and notes.

The following, among other decided cases, support either directly or by analogy the foregoing conclusion: *Shapleigh*

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v. *Baird*, 26 Mo. 322; *Bryan v. Brisbin*, 26 Mo. 423; *Martin v. Hausman*, 14 Fed. Rep. 160; *Atherton v. Ives*, 20 Fed. Rep. 894; *Mackintosh v. Corner*, 33 Md. 598; *Rumery v. McCulloch*, 54 Wis. 565; *Thomas v. Talmadge*, 16 Ohio St. 433; *Wiener v. Davis*, 18 Pa. St. 331; *Darling v. Rogers*, 22 Wend. 483.

The fact has not been overlooked, that in some of the States, statutes were in force at the time some of the decisions above cited were made, which expressly enacted that preferences contained in deeds of general assignment should be void, and that all assignments should inure to the equal benefit of all the assignor's creditors. Our conclusion is nevertheless, that the act regulating voluntary assignments in this State has substantially the same effect, and that while it renders the preference of creditors voidable, the fact that the deed makes provision for preferences does not overthrow the whole assignment and make the deed fraudulent *per se*, unless it is apparent therefrom that such preferences were actually fraudulent, and that the deed was not intended to have effect and be operative under and in accordance with the provisions of the statute.

While adhering to the conclusion arrived at in *Grubbs v. Morris*, *supra*, the effect of which is to hold that preferences in a deed of assignment are invalid and can not be enforced in favor of a creditor so preferred, we affirm the decision of the court below, both in respect to its rulings on the complaint and cross complaint, upon the theory above stated.

The judgment is affirmed, with costs.

Filed Dec. 16, 1886.

Rice v. Boyer.

No. 12,864.

RICE v. BOYER.

CONTRACT.—Infant.—Voidable.—The contract of an infant for the purchase of personal property not a necessary is voidable, not void.

SAME.—Disaffirmance During Non-Age.—An infant may repudiate a contract respecting personal property during non-age.

SAME.—Disaffirmance Avoids Ab Initio.—The disaffirmance of a voidable contract of an infant avoids it *ab initio*, and it ceases to be effective for any purpose.

SAME.—False Representation of Age.—Fraud.—Action Ex Delicto Will Lie Against Infant.—An action will lie against an infant, who has obtained property on the faith of a false and fraudulent representation that he is of full age, for the loss actually sustained by a party who dealt with him in good faith and in the exercise of reasonable diligence, where a recovery can be had without giving effect to the contract.

SAME.—When Action May be Brought.—In such a case, the action may be brought when the contract is repudiated, although the time for performance has not expired.

PLEADING.—Complaint.—Demurrer.—If a complaint states facts entitling the plaintiff to relief, it will repel a demurrer, although it may not entitle him to all the relief prayed.

From the Clinton Circuit Court.

F. F. Moore, for appellant.

J. V. Kent and J. W. Merritt, for appellee.

ELLIOTT, C. J.—It is alleged in the complaint of the appellant, that the appellee, with intent to defraud the appellant, falsely and fraudulently represented that he was twenty-one years of age; that, relying on this representation, the appellant was induced to sell and deliver to the appellee, on one year's credit, a buggy and a set of harness; that the appellee, in payment for the property, delivered to appellant a buggy, and executed to him a promissory note, payable one year after date, and also executed a chattel mortgage to secure the payment of the note; that the appellee's representation was untrue; that he had not attained the age of twenty-one years; that on account of appellee's non-age the note can not be enforced; that the appellee avoided his note and mortgage by a sale of the mortgaged property, "and repudiates and re-

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fuses to be bound by his contract in reference thereto;" that the appellant brings into court the note and mortgage executed to him, and tenders them to the appellee. Prayer for judgment for the value of the property delivered to appellee.

To this complaint a demurrer was sustained, and error is assigned on that ruling.

The appellee's counsel defend the ruling principally upon the ground that the action was prematurely brought, inasmuch as it can not be determined that any injury will be done the appellant until the expiration of the year fixed for the payment of the property purchased of the appellant. We agree with counsel that the contract is voidable, not void, and that the appellee might have performed it notwithstanding his non-age if he had so elected. *Price v. Jennings*, 62 Ind. 111; *Board, etc., v. Anderson*, 63 Ind. 367; *Shrock v. Crowl*, 83 Ind. 243.

But this principle is not broad enough to meet the averment of the complaint, that the appellee has repudiated his contract and refuses to be bound by it. As the authorities relied on by counsel do not fully cover the case, further investigation is necessary, and the first step in this investigation is to ascertain and declare the effect of the infant's repudiation of his contract.

In *Shrock v. Crowl*, *supra*, the holding in *Mustard v. Wohlford*, 15 Gratt. 329, that, where the voidable act of an infant is disaffirmed, it avoids the contract *ab initio*, is fully approved. If this is the law, then, when the appellee repudiated his contract, he destroyed it for all purposes. It no longer bound him, nor could he take any benefit from it. If the contract was destroyed back to the beginning, it ceased to be operative for anybody's benefit. We think the principle of law is correctly stated in the cases to which we have referred, and that the conclusion we have stated is the logical, and, indeed, inevitable sequence of that principle. *Tyler Infancy and Coverture*, 78.

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An infant may repudiate a contract respecting personal property during non-age. *Briggs v. McCabe*, 27 Ind. 327; *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Clark v. Van-Court*, 100 Ind. 113 (50 Am. R. 774); *House v. Alexander*, 105 Ind. 109 (55 Am. R. 189); *Hoyt v. Wilkinson*, 57 Vt. 404; *Price v. Furman*, 27 Vt. 268; *Willis v. Twambly*, 13 Mass. 204; *Stafford v. Roof*, 9 Cowen, 626; *Bool v. Mix*, 17 Wend. 119.

The repudiation by the appellee was, therefore, a complete avoidance of the contract, effectually putting an end to its existence, both as to him and as to the adult with whom he contracted.

It is evident from what we have said, that the ground taken by the appellee's counsel is not tenable, for, when their client repudiated the contract, as it is alleged he did, it ceased to be effective for any purpose.

It is contended by appellee's counsel that the appellant can not recover the value fixed on the property by the contract, and that the complaint is, therefore, insufficient. There is a plain fallacy in this argument. If a complaint states facts entitling the plaintiff to relief it will repel a demurrer, although it may not entitle him to all the relief prayed. *Bayless v. Glenn*, 72 Ind. 5, and cases cited. The question as to the measure of damages is not presented by a demurrer to a complaint where a cause of action is presented entitling the plaintiff to some damages, for the question which the demurrer presents is, whether the facts are sufficient to constitute a cause of action.

The material and controlling question in the case is this: Will an action to recover the actual loss sustained by a plaintiff lie against an infant who has obtained property on the faith of a false and fraudulent representation that he is of full age?

Infants are in many cases liable for torts committed by them, but they are not liable where the wrong is connected with a contract, and the result of the judgment is to indi-

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rectly enforce the contract. Judge COOLEY says: "If the wrong grows out of contract relations, and the real injury consists in the non-performance of the contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it as a tort." Cooley Torts, 106. In another place the same author says: "So if an infant effects a sale by means of deception and fraud, his infancy protects him." Cooley Torts, 107. Addison, following the English cases, says: An infant is not liable "if the cause of action is grounded on matter of contract with the infant, and constitutes a breach of contract as well as a tort." Addison Torts, section 1314.

Upon this principle it has been held in some of the cases that an infant is not liable for the value of property obtained by means of false representations. *Howlett v. Haswell*, 4 Campb. 118; *Green v. Greenbank*, 2 Marsh. 485; *Vasse v. Smith*, 6 Cranch 226 (1 Am. Lead. Cases, 237); *Studwell v. Shapter*, 54 N. Y. 249.

It is also generally held that an infant is not estopped by a false representation as to his age, but this doctrine rests upon the principle that one under the disability of coverture or infancy has no power to remove the disability by a representation. *Carpenter v. Carpenter*, 45 Ind. 142; *Sims v. Everhardt*, 102 U. S. 300; *Whitcomb v. Joslyn*, 51 Vt. 79 (31 Am. R. 678); *Conrad v. Lane*, 26 Minn. 389 (37 Am. R. 412); *Wieland v. Kobick*, 110 Ill. 16 (51 Am. R. 676); *Ward v. Berkshire Life Ins. Co.*, ante, p. 301.

It is evident from this brief reference to the authorities, that it is not easy to extract a principle that will supply satisfactory reasons for the solution of the difficulty here presented. It is to be expected that we should find, as we do, stubborn conflict in the authorities as to the question here directly presented, namely, whether an action will lie against an infant for falsely representing himself to be of full age.

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Johnson v. Pie, 1 Lev. 169; *Price v. Hewett*, 8 Exch. 146; *Liverpool, etc., Ass'n v. Fairhurst*, 9 Exch. 422; *Brown v. Dunham*, 1 Root, 272; *Curtin v. Patton*, 11 Sergt. & R. 305; *Homer v. Thwing*, 3 Pick. 492; *Word v. Vance*, 1 N. & McC. 197; *Fitts v. Hall*, 9 N. H. 441; *Norris v. Vance*, 3 Rich. 164; *Gilson v. Spear*, 38 Vt. 311.

Our judgment, however, is that where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract, for the recovery is not upon the contract, as that is treated as of no effect; nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability, for it concedes this, but affirms that he must answer for his positive fraud.

Our conclusion that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age, is well sustained by authority, and it is strongly entrenched in principle, although, as we have said, there is a fierce conflict. It has been sanctioned by this court, although, perhaps, not in a strictly authoritative way, for it was said by WORDEN, J., speaking for the court, in *Carpenter v. Carpenter*, *supra*, that "The false representation by the plaintiff, as alleged, that he was of full age, does not make the contract valid, nor does it estop the plaintiff to set up his infancy in avoidance of the contract; although it may furnish ground of an action against him for the tort. See 1 Parsons Cont. 317; 2 Kent Com. (12th ed.) 241."

The reasoning of the court in the case of *Pittsburgh, etc.*,

R. W. Co. v. Adams, 105 Ind. 151, tends strongly in the same direction.

In *Neff v. Landis*, 1 Atlantic R. 177, it was said: "It can not be doubted that a minor who, under such circumstances, obtains the property of another by pretending to be of full age and legally responsible, when in fact he is not, is guilty of a fraud by false pretence, for which he is answerable under the criminal law. 2 Whart. Crim. Law, 2099."

If it be true, as asserted in the case from which we have quoted, that an infant who falsely and fraudulently represents himself to be of full age is amenable to the criminal law, it must be true, that he is responsible in an action of tort to the person whom he has wronged. The earlier English cases were undoubtedly against our conclusion, but the later cases seem to take a different view of the question; thus, in *Ex parte Unity, etc., Banking Ass'n*, 3 DeG. & J. 63, it was held that, in equity, an infant who falsely and fraudulently represented himself to be of full age was bound to pay the obligation entered into on the faith of his representation.

In the note to the case of *Humphrey v. Douglass*, 33 Am. Dec. 177, Mr. Freeman says, in speaking of the decision in *Kilgore v. Jordan*, 17 Texas, 341, that, "Aside from any question of authority, the rule given, in the case last cited, by HEMPHILL, C. J., as the rule of the Spanish, derived from the civil law, that if a minor represents himself to be of age, and from his person he appears to be so, he will be bound by any contract made with him, seems to be most consonant with reason and justice."

Mr. Pomeroy pushes the doctrine much farther than we are required to do here, for he says: "If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were adult, and may cancel a conveyance or executed contract obtained by fraud." 2 Pomeroy Eq., sec. 945.

In addition to cases cited which sustain our view may be

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cited the following authorities: *Fitts v. Hall*, 9 N. H. 441; *Eckstein v. Frank*, 1 Daly, 334; *Schunemann v. Paradise*, 46 How. Pr. 426; Tyler Infancy, 182; 1 Parsons Cont. 317, note; 1 Story Eq. 385.

The English cases recognize a distinction between suits of equitable cognizance and actions at law, and declare that a representation as to age, when falsely and fraudulently made, will bind an infant in equity. *Ex parte Unity, etc., Ass'n, supra*, and authorities cited. Under our system we can recognize no such distinction, a distinction which is, as we think, a shadowy one under any system, for in our system the rules of law and equity are merged and mingled. Under such a system as ours courts should pursue such a course as will render justice to suitors under the rules of equity, which, after all, are but the embodiment of the principles of natural justice. It can not be the duty of any court of Indiana to deny substantial justice because the complaint states a cause of action in a peculiar form, for under our system courts must render such judgments as yield justice to those who invoke their aid, irrespective of mere forms, in all cases where the substantial facts are stated, and are such as entitle the party to the general relief sought. They will not inquire whether the proceeding which asks their aid is at law or in equity, but they will render justice to those who ask it in the method prescribed by our code of civil procedure.

It is laid down as a general rule by all the text-writers, that infants are liable for their torts, but many of these writers when they come to consider such a question as we have here, are sorely perplexed by the early English decisions, and, by subtle refinement, attempt to discriminate between pure torts and torts connected with contracts, and to create an artificial class of actions. Their reasoning is not satisfactory. Aside from mere personal torts, it is scarcely possible to conceive a tort not in some way connected with a contract, and yet all the authorities agree that the liability of infants is not confined to mere personal torts. There is a

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connection between a contract and a tort in every case of bailment, of the bargain and sale of personal property, and of the purchase and sale of real estate, and if an infant is not responsible for his fraudulent representation of his age, in connection with such transactions, there is not within the whole range of business transactions any case in which he could be made liable for his fraud. There are many cases, far too numerous for citation, where there is some connection between the contract and the tort, and yet it is unhesitatingly held that the infant is liable for his tort. Cooley Torts, 112, auth. cited in notes. The cases certainly do agree; it is, indeed, difficult, if not impossible, to perceive how it could be otherwise, that, although there may be some connection between the contract and the wrong, the infant may be liable for his tort. It seems to us that the only logical and defensible conclusion is, that he is liable, to the extent of the loss actually sustained, for his tort, where a recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise? There is no enforcement of a promise where an infant who has been guilty of a positive fraud is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith and has exercised due diligence. Nor does such a rule open the way for a designing man to take advantage of an infant, for it holds him to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, because it allows him compensation only for the actual loss sustained. It does not permit him to make any profit out of an executory contract, but it simply makes good his actual loss.

It is worthy of observation that in the cases which hold that an infant's representation will not estop him to deny his disability, it is generally declared that he may, nevertheless, be held liable for his tort.

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It may often happen that the age and appearance of the infant will be such as to preclude a recovery for a fraud, because reasonable diligence, which is exacted in all cases, would warn the plaintiff of the non-age of the defendant. On the other hand, the infant may be in years almost of full age, and in appearance entirely so, and thus deceive the most diligent by his representations. Suppose a minor, who is really twenty years and ten months old, but in appearance a man of full age, should obtain goods by falsely and fraudulently representing that he is twenty-one years of age, ought he not, on the plainest principles of natural justice, to be held liable, not on his contract, but for the loss occasioned by his fraud?

The rule which we adopt will enable courts to protect, in some measure, the honest and diligent, but none other, who are misled by a false and fraudulent representation, and it will not open the way to imposition upon infants, for, in no event, can anything more than the actual loss sustained be recovered, and no person who trusts, where fair dealing and due diligence require him not to trust, can reap any benefit. It will not apply to an executory contract which an infant refuses to perform, for, in such a case, the action would be on the promise, and the only recovery that could be had would be for the breach of contract, and the terms of our rule forbid such a result, but it will apply where an infant, on the faith of his false and fraudulent representation, obtains property from another and then repudiates his contract. Any other rule would in many cases suffer a person guilty of positive fraud to escape loss, although his fraud had enabled him to secure and make way with the property of one who had trusted in good faith to his representation, and had exercised due care and diligence. We are unwilling to sanction any rule which will enable an infant who has obtained the property of another, by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself or selling it to

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another, and when asked to pay its just and reasonable value successfully plead his infancy. Such a rule would make the defence of infancy both a shield and a sword, and this is a result which the principles of justice forbid, for they require that it should be merely a shield of defence.

Judgment reversed with instructions to overrule the demurrer to the complaint.

Filed Dec. 16, 1886.

108	481
128	405
108	481
132	535
108	481
139	378
108	481
141	566

No. 12,520.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. PEDIGO.

NEGLIGENCE.—Railroad.—Defective Bridge.—Evidence.—Rate of Speed.—Res Gestæ.—Pleading.—Where, in a complaint against a railroad company to recover for personal injuries sustained by the breaking down of a bridge, it is alleged that at the time of the accident it was wholly unsafe and dangerous to run a train over such bridge on account of its bad condition, by reason of its defective construction and the negligent manner in which repairs were being made, evidence as to the rate of speed at which the train was being run is admissible as part of the *res gestæ*.

SAME.—Breaking Down of Bridge While Being Repaired.—Presumption of Negligence.—Rebuttal.—Appliances for Making Repairs.—Degree of Care Required.—Where a bridge, which is being repaired, breaks down while a train laden with passengers is passing over it, in an action by a passenger for an injury thereby sustained, it is not sufficient to rebut the presumption of negligence for the carrier to show that it was using the means and appliances ordinarily employed by prudent persons in making such repairs, without also showing that they are ordinarily sufficient, and that they were without known or discoverable defect, and were used with the utmost practical care and diligence.

SAME.—Interrogatories to Jury.—It is not proper to submit to the jury interrogatories which merely call for an expression of opinion upon a question of law involved in the case, nor interrogatories the answers to which can have no influence on the general verdict.

VERDICT.—Excessive Damages.—Supreme Court.—Practice.—The Supreme
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Court will not disturb a verdict as to the amount of damages assessed, on the ground that they are excessive, where it does not appear that the jury must have acted from prejudice, partiality, or other improper motive.

From the Marion Superior Court.

G. W. Easley, G. R. Eldridge and W. Irvin, for appellant.
F. M. Charlton, T. W. Lockhart, J. O. Pedigo, F. J. Van Vorhis and W. W. Spencer, for appellee.

MITCHELL, J.—This action was brought by Pedigo against the railway company to recover damages for personal injuries alleged to have been suffered by him on January 31st, 1884, at Broad Ripple, near the city of Indianapolis, while being carried as a passenger on one of the company's trains.

The injury is alleged to have been sustained without the plaintiff's fault, by the breaking down of a railway bridge, negligently maintained by the company over White river. In consequence of the fall of the bridge, the car in which the plaintiff was seated was thrown into the river below.

The plaintiff had judgment in the court below for \$4,500. A reversal of this judgment is now asked upon various errors assigned.

In the order in which the questions have been presented, the first ground upon which a reversal is asked involves a ruling of the court in admitting certain testimony concerning the rate of speed at which the train was proceeding when the disaster occurred.

The conductor of the train, having been examined as a witness on behalf of the defendant, was asked on cross-examination the following question: "How fast was the train running when it struck the bridge?" Over objection he was permitted to give the following answer: "From fifteen to eighteen miles an hour."

Another witness, who was engaged in making repairs to the bridge at the time it fell, having testified on the defendant's behalf, was asked on cross-examination whether he had

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not said to a person named, at a time and place mentioned, that the supports which held the bridge when the train came upon it would have been sufficient but for the high rate of speed at which the train was going. The witness answered, over objection: "I might have told him that; * * I said that I believed the train was running faster than it ought to over the bridge."

The appellant's argument is, that as there was no allegation in the complaint that the train was run at a negligent rate of speed, the admitted evidence was outside of any issue in the case, and that hence the ruling was both erroneous and hurtful.

This view of the question is not tenable. While the complaint contains no such allegation as that referred to, it is charged therein that at the time the train ran on to the bridge it was "wholly and entirely unsafe and dangerous to run an engine and train over the same," on account of its insecure and defective condition, growing out of defects in its original construction, and because of the negligent and unskilful manner in which repairs upon it were being prosecuted.

The issue thus tendered made any evidence relating to the condition of the bridge at the time it fell, the manner in which it was supported during the process of repairment then going on, the weight of the train and the speed at which it was being run, competent as part of the *res gestæ*.

If, owing to the condition of the bridge, it was dangerous to run an engine and train upon it at all, it might evince a degree of negligence bordering upon recklessness if the train was run upon it at such a rate of speed as to multiply the probabilities that the bridge would fall.

If the bridge was not supported while undergoing repairs so as to sustain the weight of the train, at the rate of speed at which the company saw fit to run it, the company was negligent in the maintenance of its bridge. Grant that trains must be run over bridges while they are undergoing repairs, the duty of the company, nevertheless, is to so adjust the

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bridge and regulate the speed of overpassing trains, as that the lives of passengers will not be put in peril.

The next ground upon which a reversal is asked is, that the court below refused to submit to the jury the sixth, seventh, eighth and ninth special interrogatories propounded by the appellant. These were as follows :

"Interrogatory No. 6. Do you find from the evidence that the employees of said defendant, engaged in putting thimbles or tubes into the chords of said bridge, were negligent in the means used or process of putting such tubes or thimbles in the bridge ?

"Interrogatory No. 7. If your answer to interrogatory No. 6 is yea, in what did the negligence consist ?

"Interrogatory No. 8. Do you find from the evidence that the employees of defendant, engaged in putting thimbles or tubes in the chords of the bridge, used the same means, appliances and mode that are ordinarily used by other railway companies in doing like work under like circumstances ?

"Interrogatory No. 9. If you answer interrogatory No. 8 in the negative, state from the evidence what difference there was in the means, appliances or mode used by the defendant and other railway companies doing like work under like circumstances."

The ruling of the court in rejecting the foregoing interrogatories was correct.

The sixth and seventh were nothing more nor less than an invitation to the jury to express an opinion upon a question of law involved in the case. That it was not their function to do this, has been determined in a number of cases. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185; *Woolery v. Louisville, etc., R. W. Co.*, 107 Ind. 381, and cases cited.

Such questions of fact, if any there be, as are included in the eighth and ninth interrogatories, are so intermixed with assumptions and other matters, to which an answer would be

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nothing more than a conclusion of an uncertain character, as renders the propriety of the ruling of the court manifest.

It was of no consequence whether the appellant used the means and appliances ordinarily used by other railway companies under like circumstances or not, provided they were used in such a manner as to render the bridge unsafe when the train came upon it, at the rate of speed shown in this case. Means and appliances for repairing railway bridges which are so employed as, that when a train load of passengers comes upon a bridge undergoing repairs, both train and passengers are precipitated into the river below, are either so manifestly insufficient, or are being so unskillfully used, as that, without showing some other cause for the disaster, against which the highest degree of practical skill and foresight could not have guarded, the company is liable to the imputation of negligence.

When an accident happens, such as that from which the alleged injury resulted, it is not sufficient to rebut the presumption of negligence which the law raises in favor of a passenger, that the carrier is able to show that it was using the means and appliances ordinarily employed, without also showing that such means and appliances are ordinarily sufficient for the purpose, and that they were without known or discoverable defect and were used in a proper and skillful manner.

However the interrogatories under consideration might have been answered, the answers could have had no influence on the general verdict. Whenever it is apparent that such will be the effect of answers, it is not only proper, but it is the duty of the court trying the cause, to reject interrogatories which invite such answers.

Among other instructions requested by the appellant and refused by the court, the sixth was to the effect that the law does not require of railway companies the utmost degree of care which the mind can conceive or imagine, or that they should be regarded as guarantors or insurers of the safety of

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passengers, or of the sufficiency of their roadways, bridges and appliances, but that the observance of the degree of care exercised by reasonably cautious persons engaged in like service under like circumstances filled the measure of their obligation. The instruction proceeded further to state, in effect, that if the jury believed that the means and appliances which were being used in repairing the bridge at the time of the disaster, were the same as those used by reasonably prudent persons engaged in like work, under like circumstances, then the defendant could not be found guilty of negligence, and the jury should return a verdict for the defendant.

It is contended that this instruction is within the rule announced in *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264 (54 Am. R. 312).

Speaking of the duty which the law imposes upon a railway, in respect to the maintenance of its tracks, etc., in the case cited we said: "While its obligation does not rise to the degree of warranting the safety of its track and roadway, the law nevertheless exacts that when an injury occurs to a passenger by an occurrence so unusual and so perilous of human life, it shall make it appear that the utmost practical care and diligence had been observed, and that no degree of care usually and practically applicable to the careful management of like railways would have discovered the defect which probably caused the accident, and thus prevented its occurrence."

Conceding the substantial accuracy of so much of the instruction asked as defines the obligation of a railway company, in respect to its not being required to observe a merely speculative or imaginary degree of caution, or to insure either the safety of passengers, or the sufficiency of its bridges, that part of it upon which the jury were asked to predicate a verdict for the defendant, falls immeasurably short of the rule announced in the case relied on.

It was not sufficient that the appellant may have used proper means and appliances in the repair of its bridge. The

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necessity of the case required it to show that in the use of those means "the utmost practical care and diligence had been observed, and that no degree of care usually and practically applicable" to the work about which it was engaged, would have discovered the probable cause of the disaster and prevented its occurrence. The instruction was properly refused.

In the fifth instruction given by the court, the jury were directed, in substance, that if they should find from the evidence, that while the railroad company's bridge over White River was undergoing repairs, its servants caused the train on which the plaintiff was a passenger to be drawn upon the bridge, and the injury to the plaintiff occurred without fault on his part by reason of the bridge giving way, and causing the car in which plaintiff was seated to fall through, their verdict should be for the plaintiff, unless they should further find from the evidence, that in making the repairs the defendant's servants exercised the "skill, care and prudence which skilled, cautious and prudent persons would and ought to use," in order to have the bridge in a condition of safety for the passage of trains, and that it "was not guilty of the slightest neglect in the use of proper and suitable means and appliances to protect said bridge and prevent its giving way or breaking down."

The objections made to this instruction relate more to the aptness of the language employed by the court than to the propriety of the principles announced. The law was, however, stated with substantial accuracy in a manner to be clearly comprehended by the jury.

Within the ruling in cases closely analogous, there was no error in giving the instruction complained of. *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551, and cases cited; *Cleveland, etc., R. R. Co. v. Newell, supra*; *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442.

The only other question, presented in such manner as to

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require notice, relates to the amount of damages assessed. It is insisted that the amount is excessive.

As, however, nothing appears to induce the belief that the jury must have acted from prejudice, partiality or other improper motive in the assessment of damages, we can not disturb their verdict. It was their exclusive province to determine the amount of compensation to be awarded for the injury sustained by the plaintiff, and having determined it so far as we can judge, upon the evidence, without the intervention of improper motives, the court can not interfere. *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134).

Judgment affirmed with costs.

Filed Oct. 12, 1886; petition for a rehearing overruled Dec. 16, 1886.

No. 12,847.

ERWIN V. GARNER ET AL.

GUARDIAN AND WARD.—Sale of Real Estate.—Mistake.—Widow.—Second Coverture.—Descent.—Forced Heirs.—Judgment.—Estoppel.—In 1865, G. died intestate the owner of the real estate in controversy, leaving a widow and six children. The widow subsequently married and died in wedlock in 1884, but in 1873, as the guardian of four of the children of her deceased husband, she petitioned for the sale of the interest of her wards in the land, describing it as the undivided four-ninths part, and an order of sale was granted. At the same term, she filed a second petition, averring a mistake in the previous description, and alleging that the wards' interest was an undivided four-sixths part, subject to her life-estate. The former order of sale was revoked and the undivided four-sixths was directed to be sold subject to the guardian's life-estate. A sale was duly made and confirmed under the last order, and a deed executed to the purchaser.

Held, that the judgment was only conclusive as to existing titles.

Held, also, that as the only absolute interest possessed by the wards at the time of the sale was such as they took as heirs of their father, the purchaser acquired only an undivided four-ninths part, and that the interest which afterwards accrued to them on the death of their mother, as her forced heirs, did not pass.

From the Marshall Circuit Court.

108	488
127	35
127	334

108	488
128	377
129	198

108	488
132	311

108	488
134	187
135	379

108	488
139	65

108	488
153	64
153	630

108	488
154	423
154	424
155	145

108	488
168	549

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J. W. Parks, S. D. Parks and H. Corbin, for appellant.
M. A. O. Packard, O. M. Packard and C. P. Drummond,
for appellees.

ELLIOTT, C. J.—In 1865 Davis Garner died intestate, the owner of the real estate in controversy, leaving surviving him his widow, Mahala Garner, and six children. The widow subsequently married James Emmons, and died his wife in 1884. At the April term, 1873, Mahala Emmons, as the guardian of four of the children of her deceased husband, Davis Garner, filed a petition for the sale of the land of her wards, describing their estate therein as the undivided four-ninths part, and an order for the sale of the land was granted. At the same term she filed a second petition, averring that a mistake had been made in describing the interest of her wards in the land, and alleging that it was an undivided four-sixths part, subject to her life-estate, and that it should have been so described. The prayer of the second petition was that the former order and sale should be set aside, and an order granted for the sale of an undivided four-sixths of the land, subject to the life-estate of the guardian therein. The prayer of this petition was granted, the first order revoked, the sale set aside, and an order entered directing the sale of an undivided four-sixths part of the land, subject to the life-estate of the guardian. On this order a sale was made, duly confirmed, and a deed executed to the purchaser.

The question, as presented by counsel, is, whether the guardian's sale conveyed to the purchaser the undivided four-sixths of the land. It is contended by the appellees that the six children of Davis Garner inherited but two-thirds or six-ninths of the land, leaving in the widow the limited interest in one-third, which, at her death, as she had married a second time, descended to the children by the first marriage, and that this interest could not be sold upon the petition of the guardian. On the other hand, it is contended by the appellant that he is protected by the provisions of the statute and

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by the rules of law, and that he had a right to rely upon the order of the court directing four-sixths of the land to be sold.

The case is a peculiar one, and not entirely free from difficulty. The second order of the court specifically ascertained the interest of the appellees in the land, fixed it at four-sixths, correcting an alleged mistake in the first order, which fixed the interest at four-ninths, and directed a sale of four-sixths of the land. It is quite plainly the law that the children represented by the guardian had an absolute interest in only four-ninths of the land, and only a mere expectant interest in the one-third vested in their mother during life, so that but for the express judgment directing the sale of four-sixths as their interest in the land, there would be little, if any, difficulty in the case. The existence of the judgment under the peculiar circumstances of the case gives rise to the difficult question, for it presents the question as to how far the adjudication concludes the parties as to their interest in the land. This difficulty is not solved by those cases which hold that a widow's interest can not be sold upon a petition by an administrator, to pay the debts of the husband, for here the guardian representing the children asked for a sale of the children's interest in the land, stating what it was, and obtained an order for the sale of the interest described in the petition. It is no doubt a hard case on the purchaser, but an examination of the papers and records would have revealed to him the fact that what the guardian assumed to sell was the interest of the children as the heirs of their deceased father, and that the only present interest they had was that vested in them in the character of their father's heirs. The interest which accrued to them on their mother's death was a distinct and different interest, for, until the death of their mother, they did not and could not inherit except from their father. *Bryan v. Uland*, 101 Ind. 477; *Thorp v. Hanes*, 107 Ind. 324.

As held in *Bryan v. Uland*, *supra*, the children had no

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interest or estate in the land during the mother's life, for they had nothing but an expectancy to take at her death, as her forced heirs.

The judgment on the guardian's petition, therefore, simply operated on the estate that the children then possessed, and that estate was only such as descended to them as the heirs of their deceased father.

The general rule is that an estoppel by judgment affects existing titles, and not those subsequently acquired. *Bryan v. Uland*, *supra*, and cases cited p. 480; *Avery v. Akins*, 74 Ind. 283.

It is also a settled rule that persons are estopped only in the capacity in which they are sued. *Bumb v. Gard*, 107 Ind. 575; *Craighead v. Dalton*, 105 Ind. 72, p. 76; *Lord v. Wilcox*, 99 Ind. 491; *Elliott v. Frakes*, 71 Ind. 412; *Unfried v. Heberer*, 63 Ind. 67; *Bigelow Estop*. 65; *Freeman Judg.*, section 156.

Judgment affirmed.

Filed Dec. 15, 1886.

 No. 12,737.

SPRAGUE v. PRITCHARD.

PLEADING.—*Motion to Strike Out.*—*Practice.*—*Supreme Court.*—*Reversible Error.*—Where a motion to strike out part of a pleading is so framed that when the pleading is copied into the transcript the part to which the motion is addressed can not be identified, it presents no question on appeal; besides, the overruling of a motion to strike out surplusage is not a reversible error.

TRIAL.—*Jurisdiction.*—*Waiver.*—Where there is no request by either party at any time for a jury, and the court orders a trial partly by a jury and partly by the court, it is too late, after a verdict and finding, to object for the first time to the trial as had.

MARRIED WOMAN.—*Attorney's Fees.*—*Lien.*—*Quare*, as to the power to

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declare an encumbrance against the land of a married woman for attorney's fees for services relating to such property.

From the Marion Superior Court.

P. W. Bartholomew, for appellant.

C. S. Denny, for appellee.

MITCHELL, J.—This was a suit by James A. Pritchard to recover for professional services, alleged to have been rendered for, and at the request of, Mrs. Sprague.

The complaint is in two paragraphs. The first is an ordinary action for services rendered.

The second paragraph is a complaint to enforce a specific lien, for the same services mentioned in the first count, against certain described real estate, which it is alleged the appellant, a married woman, owned in her own right, and in securing the title to which the services were alleged to have been rendered by the appellee in the year 1880.

Issue was formed by an answer in denial. Finding and decree enforcing a specific lien for \$400 against the land described, in favor of appellee.

The appellant at the proper time made a motion to strike out portions of the second paragraph of the complaint. This motion was overruled.

The written motion, which appears in the record, asks the court to strike out all that part of the second paragraph, "commencing with the beginning of line thirty and including said line" down to and including line sixty-two. As the complaint appears in the transcript, there are no lines which correspond with those above mentioned. We are, therefore, without the means of identifying the part of the complaint to which the motion was intended to apply. *City of Crawfordsville v. Barr*, 45 Ind. 258; *Berkshire v. Young*, 45 Ind. 461.

Where a motion to strike out is so framed that when it is copied into the transcript, that part of the pleading to

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which it was intended to apply can not be identified, manifestly it presents no question for consideration here ; besides, " This court has never reversed a judgment because of the refusal of the lower court to strike out of a pleading immaterial matter or surplusage." *Gill v. State, ex rel.*, 72 Ind. 266.

At the proper time the court directed a jury to be called to try the issue joined on the first paragraph of the complaint. The court, at the same time, announced that the issue on the second paragraph would be tried by the court, with the advice of the jury, by way of interrogatories and answers thereafter to be submitted. The trial was proceeded with, without objection, until after the jury returned a general verdict upon the first paragraph, and answers to interrogatories relating to the second. The appellant then objected to the jurisdiction of the court and moved for a *tenire de novo*.

As there was no request made by either party at any time for a jury, and no objection to the trial as ordered by the court, until after a verdict and finding against the appellant, the record presents no question for consideration in that regard.

It is said the court proceeded upon the authority of *Major v. Symmes*, 19 Ind. 117, *Sharpe v. Clifford*, 44 Ind. 346, and kindred cases, to try the cause, as one of equitable cognizance, so far as the second paragraph of the complaint was concerned, and to enforce a lien for the value of appellee's professional services against the land described.

If any question had been properly made, in respect to the regularity of the proceeding, or in regard to the power of the court to declare an encumbrance against the land of a married woman for attorney's fees, it might have become necessary for this court to determine whether the authorities relied on were applicable under the statute relating to married women, which was in force when the services were rendered. It might have been a question too, whether the later

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decisions on the subject involved have not impaired the authority of the cases apparently relied on. *Pierce v. Osman*, 79 Ind. 259.

The record, however, presents no question and the judgment is, therefore, affirmed with costs.

Filed Dec. 15, 1886.

No. 12,589.

HOES ET AL. v. BOYER ET AL.

MORTGAGE.—*Foreclosure.*—*Complaint.*—*Description of Interests of Defendants.*

—It is not necessary, in a complaint for the foreclosure of a mortgage, to specifically describe the interest which each defendant has or may claim to have in the real estate covered by the mortgage.

SAME.—*Recording.*—*Averments as to.*—*Subsequent Purchasers.*—*Notice.*—

Where it is shown by a complaint to foreclose a mortgage that any of the defendants are subsequent purchasers, it must be alleged that they purchased with actual notice of the mortgage, or that it was recorded within the time fixed by the statute, or before the sale and conveyance of the mortgaged property; but where it does not appear from the allegations of the complaint that any of the defendants are subsequent purchasers, it is not necessary to the sufficiency of the complaint that it should contain an averment that the mortgage has been recorded.

ASSIGNMENT OF ERROR.—*By Appellants Jointly.*—*Sufficiency.*—Where errors are jointly assigned by several appellants, they must be well taken as to all in order to be available to any one of them.

HUSBAND AND WIFE.—*Fraudulent Conveyance.*—*Preference of Wife as Creditor.*—A husband may prefer his wife as a creditor by conveying to her real estate in payment of his indebtedness to her, and such preference will be upheld, if untainted with fraud.

From the Jasper Circuit Court.

S. P. Thompson, for appellants.

F. Knefler and *J. S. Berryhill*, for appellees.

ZOLLARS, J.—Appellee Boyer brought this suit to foreclose a mortgage. It is alleged in the complaint that in August,

108	494
131	18
133	667
108	494
148	455
148	456
108	494
163	496
163	676
108	494
159	619

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1878, Frances E. Williams and her husband, Lyman U. Williams, executed to Boyer a mortgage on eighty acres of land in Jasper county, to secure the payment of a note, executed by them to him; that Frances E. died in 1884, leaving surviving her husband and three sons, naming them, as her only heirs at law.

The husband and sons were made parties defendants to the suit, as was also the appellant William F. Hoes.

As to him, the allegations in the complaint are, that he claims to have some sort of title to the land described in the mortgage, by virtue of a sheriff's deed executed by the sheriff of Jasper county, in pursuance of a sale by him upon an execution from the superior court of Marion county; that his claim is adverse to the plaintiff's interest, and is without any foundation whatever, either in law or equity.

The complaint is assailed for the first time by assigning as error in this court, that it does not state facts sufficient to constitute a cause of action.

The complaint, as will be observed, is not specific, either as to the nature of Hoes' claim, the date of the sheriff's deed to him, the date of the sale by the sheriff, the date of the execution, or as to any judgment upon which it may have been issued. It does not appear from the averments in the complaint, whether the sale by the sheriff to Hoes was prior or subsequent to the execution of the mortgage which Boyer is seeking to foreclose.

These uncertainties, however, do not render the complaint insufficient, and especially do they not render it insufficient as against the assault upon it for the first time by the assignment of errors in this court. It was a sufficient challenge to Hoes to set up whatever title or interest he might have, which would stand in the way of a foreclosure of the mortgage. *Hose v. Alhwein*, 91 Ind. 497 (501); *Barton v. Anderson*, 104 Ind. 578 (581); *Craighead v. Dalton*, 105 Ind. 72; *Carver v. Carver*, 97 Ind. 497 (504); *Ulrich v. Drischell*, 88 Ind. 354; *Stockwell v. State, ex rel.*, 101 Ind. 1 (7, 17); *Lassiter v.*

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Jackman, 88 Ind. 118; *Pennsylvania Co. v. Rusie*, 95 Ind. 236; *Soice v. Huff*, 102 Ind. 422; *Owen School Tp. v. Hay*, 107 Ind. 351; *Buchanan v. State, ex rel.*, 106 Ind. 251.

When we have decided, as we here do decide, that it is not necessary, in a complaint for the foreclosure of a mortgage, to describe the interest which each defendant may have, or claim to have, in the land covered by the mortgage, we have, in effect, decided that it is not necessary to allege in all cases that the mortgage has been recorded.

The purpose of the statute providing for the recording of mortgages, is to protect innocent purchasers. As between the parties to the mortgage, and all persons with notice, the mortgage is good and effectual without being recorded; and hence, in a suit to foreclose the mortgage, where there are no defendants except the mortgagor, it is not necessary to allege in the complaint that the mortgage has been recorded. And so, where it is alleged that some of the defendants to the suit are subsequent purchasers, with actual notice of the mortgage, it is not necessary to allege also that the mortgage has been recorded. *Faulkner v. Overturf*, 49 Ind. 265; *Scarry v. Eldridge*, 63 Ind. 44.

It has been held by this court, and correctly so, that in some cases it must be alleged in the complaint in the foreclosure suit, that the mortgage has been recorded. In each of the cases, however, where such an allegation was held to be necessary, it appeared from the averments in the complaint, that some of the defendants were purchasers and grantees of the mortgaged real estate, subsequent to the mortgage. *Magee v. Sanderson*, 10 Ind. 261; *Peru Bridge Co. v. Hendricks*, 18 Ind. 11; *Scarry v. Eldridge, supra*; *Faulkner v. Overturf, supra*.

In the case of *Martens v. Rawdon*, 78 Ind. 85, cited by counsel, it was held that an answer by one of the defendants in a foreclosure suit, that he was a subsequent purchaser for value, and without notice of the mortgage, was a sufficient

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answer to a complaint in which there was no averment that the mortgage had been recorded.

Whether, in that case, it was made to appear by the complaint, that the defendant who filed the answer was a subsequent purchaser, can not be determined from the opinion. The sufficiency of the complaint was not questioned before the court, and nothing said in the opinion is authority for the proposition, that in all cases, where there are defendants besides the mortgagors, the complaint must contain an averment that the mortgage has been recorded.

If, in that case, it was made to appear by the averments in the complaint, that the defendant Rawdon was a subsequent purchaser, then the further averment that the mortgage had been recorded, was necessary. If, on the other hand, it did not appear from the allegations in the complaint, that he was a subsequent purchaser, an averment that the mortgage had been recorded was not necessary to the sufficiency of the complaint.

The answer was sufficient for the complaint, not because the case fell within the rule that a bad answer is good enough for a bad complaint, but because it contained the affirmative statement, not inconsistent with anything alleged in the complaint, that the defendant, being a subsequent purchaser, had no notice of the mortgage. That allegation might have been met with a reply, that the mortgage had been recorded.

We think the correct rule is, that where it is shown by the complaint in a foreclosure suit that any of the defendants are subsequent purchasers, the complaint must contain an averment that they purchased with actual notice, or that the mortgage was recorded within the time fixed by the statute, or before the sale and conveyance of the mortgaged property ; and that where it does not appear from the allegations in the complaint in such a case, that any of the defendants are subsequent purchasers, it is not necessary to the sufficiency of the complaint that it shall contain an averment that the mort-

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gage has been recorded. The recording of the mortgage could be of no consequence to a defendant whose title or claim of title antedates the mortgage. Neither could it be of any consequence to a defendant who is simply a judgment creditor, and in no sense an innocent purchaser.

In the case before us, as we have seen, the complaint does not show that appellants, or either of them, were subsequent purchasers. It is alleged that Hoes claims to have some sort of title to the land, through a sheriff's sale, but it is not alleged, nor in any way shown, that that sale was subsequent to the mortgage.

Without in any way defining Hoes' claim of title, except to characterize it as having no foundation either in law or equity, the complaint is a challenge to him to set up his title. This he did by an answer, which shows that the sheriff's sale upon which he relies antedates the mortgage about one year. Beyond question the complaint is good as against Hoes. We do not, therefore, extend this opinion to determine its sufficiency as against the appellants Waleski and Meiser. The errors are jointly assigned by all of the appellants, Hoes, Waleski and Meiser, and must be well taken as to all in order to be available for any one of them. *Hinkle v. Shelley*, 100 Ind. 88.

The pleadings filed by Hoes and the other appellants, Waleski and Meiser, defendants below, and the proof in their behalf, show, that the sheriff's sale, upon which they predicate their title to the land described in the mortgage, antedates the mortgage about one year; hence, it is of no consequence whatever to them when the mortgage was recorded, or that it has ever been recorded.

Hoes had the land sold by the sheriff of Jasper county as the property of Lyman U. Williams, in satisfaction of a judgment which he recovered against him, Williams, in the superior court of Marion county, in April, 1875, upon a promissory note dated in 1873. He purchased the land at the sheriff's sale, and received his deed from the sheriff in

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1878. Appellant Waleski afterwards purchased the land from Hoes, and received from him a warranty deed therefor. He afterwards sold and conveyed one-half of it to appellant Meiser. The land was originally purchased from one Shuler, and by him conveyed to Frances E. Williams, wife of Lyman U. Williams, in September, 1875. She and her husband executed the mortgage in suit in August, 1878.

Appellants filed cross complaints, alleging therein that the land was purchased from Shuler by Lyman U. Williams, and paid for by him, and that the conveyance of it to his wife, Frances E., was in fraud of his creditors, of whom Hoes was one.

In these cross complaints they asked that the land might be adjudged to have been the property of Lyman U., and that their titles thereto might be quieted, as against Boyer, the mortgagee, plaintiff below, and appellee here.

Was the land the property of Lyman U., and conveyed to his wife, Frances E., in fraud of Hoes, a creditor? That is the main question of fact in the case.

The court below found that the land was the property of Frances E., and decreed a foreclosure of the mortgage. This court can not reverse the judgment upon the evidence.

It is shown by the evidence that Lyman U. and Frances E. Williams were married in 1851; that sometime thereafter he borrowed from her about three hundred dollars; that subsequently he repaid, and again borrowed it at different times; that at different times she had it loaned to other persons; that in 1871 the wife received from the estate of a deceased sister about six hundred dollars, which the husband also borrowed; that in 1875, at the time the deed for the land in question here was made to the wife, he owed her for the moneys thus borrowed, about one thousand dollars; that he purchased the land from Shuler, and paid therefor about four hundred dollars, and had it conveyed to the wife as a payment to her of that amount, upon his indebtedness to her, and that she accepted it as such.

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The evidence thus shows that Lyman U. Williams gave his wife a preference as one of his creditors. Such preferences may be made, and will be upheld, if untainted with fraud. *Grubbs v. Morris*, 103 Ind. 166.

As against the finding of the court below, this court can not say that there was any fraud in the conveyance of the land to the wife, Frances E.

It is said in argument that the money which she had in 1851 became the property of the husband by virtue of the marriage, under the law as it then stood. A sufficient answer to that is, that the husband treated the money as hers, repaid it to her, and again borrowed it at various times thereafter, and that he also owed her six hundred dollars borrowed from her in 1871. *Proctor v. Cole*, 104 Ind. 373 (383).

Upon the whole case, as presented by the record, the judgment ought to be and is affirmed, with costs.

Filed Dec. 16, 1886.

No. 12,371.

NALTNER ET AL. v. DOLAN ET AL.

ATTORNEY AND CLIENT.—Attachment and Garnishment.—Money Collected for Client.—Deposit Without Designation of Trust Character.—Suspension of Bank Liability of Attorney.—Where an attorney deposits money collected for a client in his own name, although not in his private account, without anything to indicate its trust character, in a bank at the time in good credit, he is responsible for any loss that may occur by reason of the bank becoming insolvent, notwithstanding the transmission of the money to the client is arrested by garnishee process against the attorney before he has an opportunity to transmit it, and the deposit thus prolonged until the suspension of the bank,

From the Marion Superior Court.

S. Claypool and *W. A. Ketcham*, for appellants.

J. R. Courtney, for appellees.

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MITCHELL, J.—Naltner, on the 24th day of February, 1883, commenced proceedings in attachment against Dolan, and on the same day caused a summons in garnishment to be served on the appellants herein. On the 7th day of March following, upon his intervening petition, Montague was admitted as a party to the proceeding. He filed a cross complaint, in which he alleged, in substance, that the fund in the hands of the appellants—that being the subject of the attachment and garnishee proceedings—had been assigned to him by Dolan, for a valuable consideration, before the proceedings were commenced. He prayed judgment for the recovery of the money.

The appellants, with the general denial, answered specially, admitting the possession of a fund which they averred had come to their hands as the attorneys of Dolan. They alleged that they had been notified by Montague of his claim after the proceedings in garnishment had been commenced, and averred their readiness to pay the money to whomsoever the court should adjudge entitled thereto. Other answers were filed, to which demurrers were sustained.

The facts were found specially by the court, and are presented in the following summary: Dolan, who at the time the suit was commenced, lived in Illinois, owed Naltner \$600, then due. The appellants, as attorneys, had in their hands for collection a claim in favor of Dolan, against the Indiana, Bloomington and Western Railway Company, which Dolan, on the 13th day of September, 1882, transferred for value, to Montague. On February 24th, 1883, the day on which the attachment suit was commenced, appellants received from the clerk of the United States District Court, for the District of Indiana, checks for something over \$80,000 which was in payment of claims against the Indiana, Bloomington and Western Railway Company, which payment was made to them in behalf of Dolan and many other of their clients. Dolan's claim against the railway company was \$600. Upon receiving the check they deposited it with the Indiana Bank-

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ing Company, which was then in good standing, the deposit being to the credit of themselves, in their firm name. The money thus received belonged to some hundreds of their clients, and the computation of interest, and the division to each of his share required several days' continuous work before distribution could be made.

The appellants were lawyers, partners, actively engaged in practice. They had an account at the bank in question in which all money collected for, and belonging to, their various clients was deposited and checked out in the firm name, but such moneys were not mingled with their own.

Before they had time or opportunity to pay out the money in controversy, the appellants were garnished at the suit of Naltner. They received notice of the assignment to Montague February 28th, 1883, four days after the suit was commenced. Montague, within a few months after giving notice of his claim, and while the proceedings in garnishment were pending, made demand on the garnishee defendants for the money remaining in their hands, which was derived from the Dolan claim.

On the 9th day of August, 1883, the Indiana Banking Company, having until that time continued in good standing and credit, failed. A receiver was appointed for the bank August 13th, 1883. The appellants brought the certificate of the receiver of the bank for the money in dispute into court, and offered to surrender it to the person entitled as the court should direct. The amount remaining in their hands in the manner above stated, was \$445.69.

Conclusions of law were stated favorable to a recovery by Montague, against the appellants, of the amount thus remaining in their hands.

Do the facts found warrant the conclusion of law stated?

Money belonging to a client having been received by the attorneys, in payment of a claim left with them for collection, the transmission of such money having been arrested by garnishee process before an opportunity for transmitting it

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occurred, the question is, having acted in the utmost good faith, and without any suggestion of fault or neglect, are the attorneys responsible for the continued solvency of the bank in which such funds were deposited in their own name, but not with their own funds, notwithstanding the bank was in good credit when the deposit was made?

The receipt of money by an attorney, under the circumstances disclosed in this case, does not *ipso facto* create the technical relation of debtor and creditor between the attorney and client. It is because it does not that a suit can not be maintained by the latter against the former without first making a demand. Money so collected belongs to the client. The attorney occupies toward it the relation of a trustee, so long as he chooses to treat and preserve the fund as a trust fund. The circumstances under which he will be liable for its loss are precisely those which govern in the case of any other trustee. While it is preserved in its trust character, if he exercises the same caution in respect to depositing it, if a deposit becomes necessary or proper, as a prudent man would in regard to his own money, and a loss happens, he will be excused. *Norwood v. Harness*, 98 Ind. 134 (49 Am. R. 739); *State, ex rel., v. Greensdale*, 106 Ind. 364 (55 Am. R. 753).

The authorities, however, distinguish between cases in which the deposit was made in such a manner as to preserve its trust character on the books of the bank in which the fund was deposited, and those in which the owner of the fund might be put to the trouble of proving by extraneous evidence that the fund was not the individual money of his trustee. Whenever a trustee, unless properly authorized to do so, puts the fund in such shape as to invest himself with a legal title to it, the *cestui que trust* has his election, either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. If a deposit is made in such manner as, on the face of the books

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of the bank in which the deposit is made, to authorize the trustee, his assignee, or legal representative, to claim it as the fund of the depositor, the *cestui que trust* has the option to do likewise. *Merket v. Smith*, 33 Kan. 66; *McAllister v. Commonwealth*, 30 Pa. St. 536; *Morris v. Wallace*, 3 Pa. St. 319; *Jackson v. Bank, etc.*, 10 Pa. St. 61; *School District, etc., v. First Nat'l Bank*, 102 Mass. 174; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Bartlett v. Hamilton*, 46 Maine, 435; 2 Pomeroy Eq. Jur., sections 1067-1076; Perry Trusts, sections 443, 444; Story Agency, section 208.

In case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank, as to indicate in some way, that it is the principal's money. If he deposit in his own name, he will not, in case of loss, be permitted to throw such loss on his principal. *Williams v. Williams*, 55 Wis. 300 (42 Am. R. 708); *Norris v. Hero*, 22 La. Ann. 605; *Mason v. Whitthorne*, 2 Cold. (Tenn.) 242; *Jenkins v. Waller*, 8 Gill & J. 218; *Robinson v. Ward*, 2 C. & P. 60; *Macdonnell v. Harding*, 7 Sim. 178; *State, ex rel., v. Greensdale, supra*.

In such a case, the good faith or intention of the trustee is in no way involved. Having for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with a legal title, it follows as a necessary consequence, when a loss occurs, he will not be permitted to say, as against his *cestui que trust*, that the fact is not as he voluntarily made it appear.

What the legal or equitable rights of the real owner of the fund would be in such a case, as against the bank, or as against attaching creditors of the depositor, has been the subject of much discussion, and of some diversity of opinion. *Pennell v. Deffell*, 4 DeG. M. & G. 372; *Farmers', etc., Bank v. King*, 57 Pa. St. 202; *School District, etc., v. First Nat'l*

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Bank, 102 Mass. 174; *Jackson v. Bank*, *supra*; *Bundy v. Town of Monticello*, 84 Ind. 119, 131, and cases cited; *McLain v. Wallace*, 103 Ind. 562; *McComas v. Long*, 85 Ind. 549; *Ellicott v. Barnes*, 31 Kan. 170, 173; *Morse Banks and Banking*, 300-302.

Whatever diversity of opinion may be found in respect to the rights of the bank, or other creditors of the depositor, the authorities agree that a trustee who either invests or deposits trust money in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund while so invested or deposited. *Gilbert v. Welsch*, 75 Ind. 557; 2 Leading Cases in Equity, 1805.

Having put the owner of the fund to the hazard of losing it, or of maintaining its trust character by such proof *aliunde* as may be available to him, the trustee thereby gives the former the privilege of treating the latter as his debtor, or of supplying the proof, or accepting his admission of the facts, at his option.

Applying the principles stated to the facts found, the conclusion follows, that the appellants assumed the risk that the bank, in which the fund was deposited in their name, and from which it could only have been drawn by their check, would be able to respond with the money when their check for it should be presented.

The fact that none but money belonging to clients was deposited in the account in which the fund in question was placed does not alter the case. The controlling consideration is, that it was deposited to the credit of the firm, without anything to designate or preserve its trust character. They took and retained the legal title to the deposit in themselves. In the event of a controversy, the character of the fund would have depended wholly on extraneous proof. This being so, the owner had the right to elect to stand upon the title to the deposit, as he found it. Having so elected, there is no rule

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of law which authorizes any inquiry into the motives for so taking the title, short of an express or implied direction from the owner of the fund.

The judgment is affirmed, with costs.

Filed Sept. 23, 1886; petition for a rehearing overruled Feb. 18, 1887.

108	506
126	171
126	90
126	372

108	506
136	386

108	506
137	234

108	506
143	437

108	506
146	482

108	506
168	172

108	506
171	384

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ASSIGNMENT OF ERRORS.—*By Appellants Jointly.*—*Practice.*—Where errors are assigned jointly, a ruling which affects only one of the appellants will not be considered.

PLEADING.—*Exhibit.*—*Reference to in Subsequent Paragraphs.*—Where an exhibit is filed with a pleading, and properly designated, it may be referred to in other paragraphs without specifically making it a part of each of them.

WILL.—*Rule in Shelley's Case.*—Where a life-estate is created in a devisee named, and the same will devises the remainder to devisees, who are named, and their lawful heirs, such devisees take an estate in fee.

SAME.—*When "Heirs" Construed to Mean "Children."*—It is only where the words of the will clearly show that the word "heirs" was used as meaning "children," that the courts will assign it that meaning.

SAME.—*When Clear Devise Affected by Subsequent Words.*—Where one clause of a will gives an estate in clear and decisive terms, such estate can not be taken away or cut down by any subsequent words that are not as clear and decisive as those giving it.

SAME.—*Executor.*—An executor can only take land to the exclusion of the heir or devisee when it is needed for the payment of the testator's debts.

From the Howard Circuit Court.

J. O'Brien, C. C. Shirley, J. M. Brown and N. N. Antrim,
for appellants.

C. E. Hendry, for appellees.

ELLIOTT, C. J.—David Hochstedler commenced this suit to foreclose a mortgage executed to him by Jesse Richenback,

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and an answer was filed by Richenback confessing the cause of action, but averring that the money due on the mortgage was claimed by Eli T. Hochstedler. The answer asked that Eli T. Hochstedler should be made a party to the suit, and that the defendant be directed to pay the amount due on the mortgage into court. The prayer of the answer was granted, and the money was paid into court. Gabriel G. Hochstedler and Eli T. Hochstedler filed answers and cross complaints, to which the appellee David Hochstedler successfully demurred. These parties also filed answers and cross complaints as executors of the will of Gabriel Hochstedler, deceased, and Eli T. Hochstedler filed a separate answer as the trustee under the will of Gabriel Hochstedler, deceased. These answers and cross complaints were also held bad on demurrer.

Error is assigned on the rulings on the demurrers to the answers and cross complaints of the appellants as executors, and on the ruling on the answer of Eli T. Hochstedler as trustee.

The errors are assigned by the appellants jointly, and under the settled rules of practice we can only regard those which affect all who join in the assignment. *Thomson v. Madison, etc., Ass'n*, 103 Ind. 279; *Hinkle v. Shelley*, 100 Ind. 88, and authorities cited; *Boyd v. Anderson*, 102 Ind. 217. We can not, therefore, give any consideration to the assignment based on the ruling upon the demurrer to the separate answer of Eli T. Hochstedler.

It is contended by appellees' counsel that some of the pleadings demurred to are insufficient, because they do not set out a copy of the will which is made part of them by way of reference. This contention can not prevail.

The will is referred to in the pleadings as "Exhibit A," and it was sufficient to file it with one of the pleadings and then refer to it as such an exhibit, without making it an exhibit to each paragraph of the pleadings. Where an exhibit is properly designated it may be referred to in different paragraphs without specifically making it a part of each of them, for,

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when an exhibit is appropriately designated and brought into the record by one paragraph of a pleading, it is not necessary, nor, indeed, proper, to encumber the record with useless repetitions.

The controlling question in the case is as to the construction of the will of Gabriel Hochstedler, the principal controversy being as to the nature of the interest it vests in the appellee David Hochstedler. So far as the interest of David Hochstedler is concerned, it is only necessary to say that the will of his father, Gabriel Hochstedler, devises property and money to his wife, and then proceeds thus: "The remainder of my property I give and bequeath to each of my five children, John G., Abigail, Eli T., David, and Gabriel G., or their children, heirs or executors, to be equally divided among them. Consideration, however, is to be taken of the amount they may have received during my lifetime as charged in a book kept by me, and in the following manner, to wit: Those who have received the least shall be first made equal to those that are next higher. Should, however, there be a deficiency to raise them all to an equality, then they shall wait until after the death of my beloved wife, Maria, when that which may be left shall be divided in the same way; if there still be a deficiency to make them equal, then those of my children who have received too much during my lifetime, to make them all equal, shall be required to pay back such amounts as may make them all equal. Should my children, together with my beloved wife, Maria, not be able to come to a mutual understanding in reference to a division of the property falling to them, within the period of six months from my decease, then it shall be sold and turned into money, and be divided as above described; until it is sold or divided it shall be under the supervision of my executors, the income to be divided as above described. In case when and after the death of my wife, if a dividend has been effected as directed above, and there should be anything left after death of what she has received from my estate, it is my will that my children pro-

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ceed to divide equally, exactly as in the first instance. It is my will and devise that the amount yet falling due to my beloved son David shall be under the immediate supervision of my other son, Eli T., who is to give bond and security of double the amount, and who is to loan it on real estate security, first mortgage, on property of one-third value more than the money loaned; the interest thereof is to be paid to my son David; or that the said Eli T., with the consent of said David, may invest the same, or any part thereof, in real estate, the deed to be made to the lawful heirs of my son David. It is my will that nothing hereinbefore mentioned shall be otherwise understood than that the property otherwise falling to my beloved son David is bequeathed to his lawful heirs, but that he shall have the benefit of all the interest or proceeds thereof as long as he shall live, and after his natural death the principal shall fall to his lawful heirs."

It is conceded by the appellants' counsel, that the clause of the will devising to the appellee David Hochstedler, and his sister and brothers, the estate in possession and in remainder, which is created for them, does, under the rule in Shelley's case, devise an estate in fee. We think the authorities require this concession, for, where a life-estate is created in a devisee named, and the same will devises the remainder to devisees, who are named, and their lawful heirs, they, the devisees, take an estate in fee. *Shimer v. Mann*, 99 Ind. 190 (50 Am. R. 82), and cases cited; *Biggs v. McCarty*, 86 Ind. 352 (44 Am. R. 320); *Gonzales v. Barton*, 45 Ind. 295; *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Doe v. Jackman*, 5 Ind. 283; 2 Washb. R. P. 596; *Preston Estates*, 271.

It is, however, contended that notwithstanding the fact that if the provisions of the will referred to stood alone, the appellee would take an estate in fee, the later provisions of the will cut down the estate to one for life. We do not doubt that where the words of the will clearly show that the word "heirs" was used as meaning children, the courts

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will assign it that meaning. *Shimer v. Mann, supra; Ridgeway v. Lanphear*, 99 Ind. 251; *Brumfield v. Drook*, 101 Ind. 190.

But the word "heirs," as Mr. Preston says, "is a powerful one," and it must be given its legal force and effect, unless the words of the will clearly assign it a different signification. *Shimer v. Mann, supra*, and cases cited. The inquiry, therefore, is, do the words of the will change the meaning affixed to the word "heirs" by a long line of decisions extending back through the centuries? In our opinion it can not be said of this will that its language does change the legal meaning of the word "heirs," for we can not reach that conclusion without violating a settled rule of law. The rule to which we refer is thus stated in the case of *Bailey v. Sanger, ante*, p. 264: "Where an interest or estate is given in one clause of a will, in clear and decisive terms, 'such interest or estate can not be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate.' *Thornhill v. Hall*, 2 Clark & Fin. 22; *Collins v. Collins*, 40 Ohio St. 353."

The later provisions of the will are by no means as clear and decisive as the earlier, for, in the earlier, the appropriate words to create a fee are employed, and the devisee is named in direct connection with persons to whom a fee is indisputably granted. It can not be doubted that estates in fee were devised to the sister and brothers of David Hochstedler, and, as he is classed with them, and precisely the same words applied to him as to them, it must surely follow that his estate is the same as theirs. It can not be possible that he took one estate and they another.

We do not in the slightest degree impugn the soundness of the rule, that it is the intention of the testator that must govern the construction of a will, but this intention, as all

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the authorities agree, must be the intention that appears upon the application of settled principles of law.

It may well be doubted whether the later provisions of the will apply at all to the land devised in the earlier part of the instrument to David Hochstedler. It is probable that the true construction of the later provisions of the will is, that they apply to other property than the land devised to him and his sister and brothers. The term "principal," as used in the will, can not with propriety be deemed to mean land, nor can the terms, "he shall have the benefit of all the interest and proceeds thereof," be justly construed as referring to land. All these terms may with propriety be construed to refer to money that in equalizing the advancements may be found due to David. This construction seems to be supported by the principal provision of the will which precedes the terms referred to, for it is written: "It is my will and devise that the amount yet falling to my beloved son, David, shall be under the supervision of my son, Eli T., who is to loan it on real estate." This provision can hardly be construed otherwise than as referring to the amount found due David on equalizing the advancements, for it is difficult to perceive how the phrase "the amount yet falling due to my son, David," can be assigned any other meaning. It is enough, however, to declare that the later provisions of the will are not as clear and decisive as those which devise to David an estate in fee, and as they are not, they can not take away or cut down the estate devised in the earlier provisions of the will. *Bailey v. Sanger, supra.*

Our conclusion is, that the will devised to David Hochstedler the fee in the land, as it did to his sister and brothers, joined with him in the clause of the will which devised to them their respective interests.

A devisee of land, vested with an immediate estate or an estate in remainder, is not a residuary legatee, and the cases of *Highnote v. White*, 67 Ind. 596, and *Gould v. Steyer*, 75 Ind. 50, have no application to such a case.

The particular estate in this instance, so far as there is an interest in remainder, is in the widow, but the devisees have even in that estate a vested remainder which they can dispose of without the intervention of the executors. So far as the devise is of a present interest in possession there can, of course, be no question as to the right of disposition. The only case in which the executors can take the land, to the exclusion of the heir or devisee, is when it is needed for the payment of the testator's debts.

Judgment affirmed.

Filed Dec. 17, 1886.

No. 11,031.

McFADDEN ET AL. v. ROSS ET AL.

REPLEVIN.—*Authority of Person who Makes Seizure.*—*Sheriff's Return.*—*Evidence.*—*Action on Bond.*—Where the plaintiff in a replevin proceeding obtains possession of the property, neither he nor his sureties can, in an action on the bond, impeach the sheriff's return, or question the authority of the person who seized the property upon the writ and from whose hands he accepted it.

SAME.—*Administrator.*—*Chattel Mortgage.*—*Mitigation of Damages.*—*Estoppel.*—Where an administrator has obtained possession of property by proceedings in replevin, he may show in mitigation of damages, in an action on the bond to recover the value of the property, that the estate of which he is administrator holds an unpaid chattel mortgage upon it, unless estopped by the adjudication in the replevin suit.

SAME.—*Former Adjudication.*—*Question of Title.*—*Not Determined Unless Distinctly in Issue.*—The action of replevin is possessory in its character, and unless the title to property is distinctly put in issue, the judgment determines nothing beyond the right of possession.

SAME.—*Pleadings.*—*Matter in Issue.*—Where the pleadings in a replevin suit show that no question of title was involved, a judgment assuming to settle the question of ownership is void.

SAME.—*Collateral Inquiry.*—Where subjects are adjudicated which are not in issue, they may be inquired into collaterally, notwithstanding the judgment.

From the Shelby Circuit Court.

108	512
124	190
126	436
108	512
129	389
108	512
134	508
108	512
138	478
108	512
141	582
108	512
145	285
108	512
149	478

McFadden *et al.* v. Ross *et al.*

B. F. Love, J. B. McFadden, C. A. Ray, F. Knefler and J. S. Berryhill, for appellants.

E. K. Adams and L. J. Hackney, for appellees.

MITCHELL, J.—Ross and Stumph sued McFadden and Miller on a replevin bond. They charged in their complaint that on the 26th day of March, 1880, they were the owners and in possession of certain personal property of the value of \$401.90, and that on that day McFadden, as administrator of the estate of Joseph Nichols, deceased, claiming to be entitled to the possession of the property, instituted a suit in replevin against them in the Shelby Circuit Court, for the recovery of the property described.

It is averred in the complaint that the property was seized by the sheriff upon a writ duly issued at the suit of McFadden, and that by means of the undertaking sued on, which was delivered to and approved by the sheriff, the possession of the property was secured by the plaintiff in the replevin suit. The plaintiffs further charge that after obtaining possession of the property by the means above mentioned, McFadden dismissed his action, after which the court found and adjudged that they—plaintiffs—were the owners, and entitled to the possession, of the property, and that it was of the value of \$401.90, and adjudged further that the property should be returned to them, or, in default thereof, that they should have execution against McFadden for the sum above mentioned.

The breach of the undertaking assigned is, that McFadden failed to prosecute the proceedings in replevin with effect, and also failed to return the property, or any part thereof, according to the judgment of the court.

A question as to the sufficiency of the complaint, argued by counsel, has been obviated by the return to a writ of *certiorari*, heretofore ordered.

The learned counsel for appellants also concede, that the

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case was eventually tried on the complaint, answer in denial, and a plea of *non est factum*, in which the delivery of the bond sued on was denied. It results that the questions made having reference to a reply, and some special answers which subsequently went out of the record, are immaterial.

At the trial the appellants admitted the genuineness of their signatures to the bond, and as the approval of the sheriff was endorsed thereon, as of the date of the commencement of the suit, its execution was sufficiently proved to authorize its admission in evidence to the jury. The objection that the bond was improperly admitted was not, therefore, well made.

During the progress of the trial, the appellants offered evidence tending to prove that the bond was not in fact delivered to the sheriff, but instead was delivered to one Capp, a bailiff of the court. They offered to prove furthermore, that the writ of replevin was also delivered to and served by Capp; that he seized the goods in controversy, and that neither the sheriff, nor any one properly authorized by him, took the property out of the plaintiffs' possession, or accepted the bond. This evidence was properly refused.

The bond has upon it the approval of the sheriff, and the official return of that officer endorsed upon the writ recites, that he seized the property therein described by virtue of the command of the writ, and that having received an undertaking from the plaintiff which he had approved, he had delivered the property to the plaintiff in the replevin suit.

Having, as it is thus made to appear, acquired possession of the property, through a proceeding set on foot by himself, and through instrumentalities which were apparently regular and satisfactory to him at the time, neither the plaintiff in the replevin suit, nor his surety, will now be heard to impeach the return of the sheriff, and the regularity of the proceedings in replevin, or to question the authority of the person who seized the property upon the writ, and from whose hands he accepted it, as in pursuance of the proceedings so instituted.

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What was said in the well considered case of *Harbaugh v. Albertson*, 102 Ind. 69, and the cases therein cited, renders it unnecessary that we should consider this point further.

That the writ of replevin under which the property was seized was subsequently quashed on the defendants' motion, does not affect the question.

As has already been seen, McFadden prosecuted the replevin suit, in which the undertaking sued on was filed, as administrator of the estate of Joseph Nichols, deceased. He averred in his complaint that, as such administrator, he was entitled to the possession of the property therein described. The pleadings and proceedings in the replevin suit, which are set out in a bill of exceptions containing the evidence, show that Ross and Stumph claimed to have purchased the property at a constable's sale, which was made to satisfy an execution in their favor, issued upon a judgment recovered by them against one George D. Nichols.

At the trial, the appellants offered to prove by the deposition of George D. Nichols, that a certain chattel mortgage, covering the property in controversy, executed by the witness to Joseph Nichols, deceased, prior to the levy and sale on the Ross and Stumph execution, remained unpaid. This mortgage was given while George D. Nichols owned the property, to secure a debt of \$500 due from the mortgagor to Joseph Nichols. Upon the appellees' objection the evidence was excluded.

The appellants contend that it was competent to prove in mitigation of damages, that the Nichols estate, of which McFadden was administrator, held an unpaid chattel mortgage on the property. That the excluded evidence was admissible can not be seriously questioned, unless the finding and judgment in the replevin suit precluded the appellants from availing themselves of the benefit of the unpaid chattel mortgage.

If the appellees were the absolute owners of the property, its value would have been the measure of their damages. If, however, the Nichols estate had a valid subsisting chattel

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mortgage upon it, the appellants were entitled to prove the fact in mitigation of damages, provided they were not estopped by the former adjudication. *Wallace v. Clark*, 7 Blackf. 298; *Stockwell v. Byrne*, 22 Ind. 6; *Miller v. Cheney*, 88 Ind. 466; *Smith v. Mosby*, 98 Ind. 445.

The replevin case having been disposed of under the act of March 5th, 1877, which provided, in effect, that in case of the dismissal, or failure to prosecute an action in replevin, where the property had been delivered to the plaintiff, the defendant might have judgment for the return of the property, or its value in case a return could not be had, and damages for its detention. The appellees now contend, that notwithstanding the dismissal the court had jurisdiction, under the foregoing act, to proceed and determine the rights of the parties. They rely upon *Williams v. Kessler*, 82 Ind. 183, *Woods v. Kessler*, 93 Ind. 356, and other cases.

Whatever authority the act referred to may have conferred upon the court, it is impossible to concede that anything outside of the issues in the case pending could have been adjudicated. The complaint in replevin tendered no issue except as to the possession of the property, and it was not competent for the court in any event, whether the case was dismissed or prosecuted to final judgment, to conclude the parties in respect to any matter which was not comprehended within the issues.

The proposition, that the judgment of a court having jurisdiction of the parties and the subject-matter, is conclusive, has become a settled maxim of the law. This, however, means nothing more than that such judgment is conclusive upon all questions which were, or might have been, litigated and determined within the issues before the court.

Neither reason nor authority lends any support to the view, that because suitors have submitted certain designated matters to the consideration of a court, the tribunal is thereby authorized to determine any other matter in which the parties may be interested, whether it be involved in the pending litiga-

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tion or not. "Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises." *Munday v. Vail*, 34 N. J. 418. *Fairochild v. Lynch*, 99 N. Y. 359; *King v. Chase*, 15 N. H. 9 (41 Am. Dec. 675); *Wood v. Jackson*, 8 Wend. 9 (22 Am. Dec. 603); *Smith v. McCool*, 16 Wallace, 560; *Bigelow Estop.*, p. 92.

Primarily, the action of replevin is possessory in its character, and, unless the title to property is distinctly put in issue, a judgment in such action determines nothing beyond the right of possession. *Entsminger v. Jackson*, 73 Ind. 144; *Kramer v. Mattheus*, 68 Ind. 172; *Highnote v. White*, 67 Ind. 596; *Hoke v. Applegate*, 92 Ind. 570; *Van Gorder v. Smith*, 99 Ind. 404; *Wells Replevin*, section 39.

The general rule is, that the issuable facts or matters, upon which the plaintiff's case proceeded, determine what was in issue, unless it appears from an examination of all the pleadings in a given case, that other matters were brought forward and thus became necessarily involved and determined in the suit. *Goble v. Dillon*, 86 Ind. 327 (44 Am. R. 308); *Griffin v. Wallace*, 66 Ind. 410; *Davis v. Brown*, 94 U. S. 423; *Russell v. Place*, 94 U. S. 606; *Cromwell v. County of Sac*, 94 U. S. 351.

A judgment upon matters not thus in issue is not conclusive, and subjects adjudicated which were not in issue may be inquired into collaterally, notwithstanding the judgment. *Munday v. Vail*, *supra*; *Campbell v. Consalus*, 25 N. Y. 613, and cases cited.

An examination of the complaint and the pleadings in the replevin suit makes it apparent that no question of title could have been conclusively determined by the judgment in that case. In so far as the court assumed to settle the question of the ownership of the property in controversy, it acted upon a matter not before it, and its finding and judgment were, in that respect, not only irregular, but *coram non judice*, and void. *Munday v. Vail*, *supra*.

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Conceding that as purchasers at an execution sale, the plaintiffs below were not entitled to take possession of the mortgaged property without complying with the terms of the mortgage, it does not follow from the judgment properly given in the replevin suit, that there was an adjudication that the mortgage debt was paid, or that it did not impose a valid subsisting encumbrance on the mortgaged property notwithstanding the rightful possession of the appellees.

The mortgagee may have waived his right at the time of the sale, and consented that the property be delivered to the purchasers upon condition that they should comply with the terms of the mortgage at a future day, or other circumstances may have appeared, which made the right to the possession of the mortgaged property by the appellees consistent with the qualified ownership of the Nichols estate as mortgagee.

Whatever facts may have been shown, it did not conclusively follow from the adjudication in the replevin suit, as the issue stood, that the appellees were the owners of the property, or that they took it discharged from the chattel mortgage.

The court therefore erred in excluding the testimony under consideration, and for this error the judgment is reversed, with costs.

Filed Sept. 14, 1886; petition for a rehearing overruled Dec. 17, 1886.

108	518
127	150
108	518
155	653

No. 12,321.

THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY v. CRUTCHFIELD ET AL.

INSURANCE.—*Foreign Company*—*Notice to Agent is Notice to Company.*—Notice to the resident agent of a foreign insurance company, in relation to any business of insurance transacted by him for the latter, is notice to the company.

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SAME.—*Condition in Policy for Notice to Company.*—*Sufficient Compliance With.*

—Where a condition of the policy requires that the assured shall give notice and also render a particular account of his loss to the company, the giving of such notice and the rendering of such account, or a tender of the same to an authorized agent of the company, constitute a sufficient compliance with the condition.

SAME.—*Condition that Procurer of Insurance Shall be Agent of Assured.*—*When*

Void.—A condition in a policy of insurance, "that any person, other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in this policy, and not of this company," is void as applied to a person *i. e.*, a local agent, upon whose counter-signature the validity of the policy, by its terms, is made to depend. It is doubtful whether such a condition, under any circumstances, can be made available as a defence for the company after a loss has happened.

DEMURRER TO EVIDENCE.—*What it Admits.*—A demurrer to the evidence admits all facts which the evidence tends to prove, or of which there is any evidence, however slight, and all inferences which can be logically and reasonably drawn from the evidence.

SAME.—*Assessment of Damages.*—*Evidence.*—*Presumption.*—Where there is a demurrer to the evidence and the jury is discharged, and, after the demurrer is overruled, the assessment of damages is submitted to the court, neither party asking for another jury, it will be presumed, if the record is silent, that the court heard all necessary evidence on the question of damages.

From the Posey Circuit Court.

A. Gilchrist, C. A. De Bruler and W. P. Edson, for appellant.

H. C. Pitcher, for appellees.

HOWK, J.—In this case, the only error relied upon here by appellant, the defendant below, for the reversal of the judgment of the trial court, is the overruling of its demurrer to appellees' evidence.

The action was upon a policy of insurance, executed by appellant, and countersigned and issued by its duly authorized agent at Mount Vernon, Indiana, on the 9th day of February, 1882, to one Thomas J. Gordon; whereby appellant, in consideration of a certain premium, did insure the said Gordon, against loss or damage by fire to his property therein described, in the sum of \$1,600, for the term of three

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years from and after the date of the policy, as follows: \$1,000 on his one-story frame dwelling-house; \$200 on his household and kitchen furniture, and \$400 on his one-story frame store-room, all occupied by him and situated on his farm, on the Mount Vernon and Uniontown road, in Henderson county, Kentucky. It was alleged by appellees in their complaint, that, on the 20th day of August, 1884, said dwelling-house was wholly consumed by fire, and the furniture damaged by such fire in the sum of \$100; that at the time of such loss, Thomas J. Gordon was the owner of the property so destroyed and damaged, and fully performed all the conditions of the policy on his part; and that, on September 1st, 1884, Gordon assigned in writing the aforesaid policy to appellees. Wherefore, etc.

Issue was joined by appellant's answer in general denial.

Counsel on both sides concur in stating that the only evidence introduced by appellees, in support of their cause of action, was the policy of insurance and its assignment, and the oral testimony of Thomas J. Gordon. On behalf of the appellant, its counsel insist that the evidence wholly fails to show that the assured had complied with the conditions of his policy, which required him to render a particular account of his loss, signed and sworn to by him, stating whether any and what other insurance had been made on the same property, etc. On the other hand, appellees' counsel contends, that the conduct of the adjuster, and general agent of the appellant, towards the assured, as shown by his testimony on the trial, was such as to dispense with, or constitute a waiver of, any compliance by the assured with the conditions of his policy requiring him to render a particular account of his loss. We give, in this connection, from the brief of appellant's counsel, the entire testimony of the assured, Thomas J. Gordon, on the trial of this cause, as follows:

"The house mentioned in the policy belonging to me burned on the 20th day of August, 1884, at 10 o'clock in the morning after breakfast. It was a total loss, and part of the fur-

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niture in the house also burned. We saved some of it. It left us out-doors, and we batched in a tent. I came to John L. Rosencrans, the local agent of the company at Mount Vernon, Ind., and told him of the loss. I sent word to him before that by David Barker. When I told Rosencrans of the loss he said it was best to wait until Mr. T. H. Smith, the adjuster of the company, came, that he (Rosencrans) had nothing to do of that kind, and that the adjuster would be here shortly. I waited eight or ten days, and came down again to see Rosencrans, when I asked him if the North British and Mercantile Insurance Company had gone into bankruptcy. Rosencrans replied that he had just received a telegram from Mr. Smith that he would be at Mount Vernon that night, and for him (Rosencrans) to prepare for a ride to-morrow. He came, and they went over the river from Mount Vernon to the premises where the house burned. The next day or two after that, on Monday, I saw Mr. Smith, the adjuster and general agent, in Mr. Rosencrans' office in Mount Vernon. He (Smith) asked me if I had made out plans and specifications and proofs of loss; that the company required them to be made. I said I am ready to make proof of loss or any other papers he wanted. He would not furnish me any papers for that purpose, and he refused to give me any instructions or satisfaction. I told him I would make them out in ten days. He said it would take thirty days. After that I tendered my account of losses to Rosencrans. He refused to take them. Rosencrans told me I must send them to the company at Chicago, and offered to furnish me an envelope with the address to send it in. Mr. Smith asked me if I had filed plans and specifications of the building burned and proof of loss. I filed my account of loss with Rosencrans, or offered to do so, the second day after Mr. Smith was in Mount Vernon, and Rosencrans refused to take them. Mr. Smith told me there were a couple of stoves saved from the building, and asked me to take care of the stoves and a piece of the sills of the house until the suit, so they could be produced at the trial if

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we had a suit. I saved a piece of the sill and intended to have it here to-day. I sent for it, but it is not here. I was owner of the house and furniture at the time of the loss."

And said witness, being cross-examined by the defendant, testified as follows :

"Mr. Smith, the adjuster, was here about three weeks after the 20th day of August, 1884, the day the house burned. It was four or five days after the fire that I saw John L. Rosencrans, and told him of the loss. I only saw Mr. Smith twice. I talked with him twice only ; both times at Mr. Rosencrans' office, in the Posey County Bank. John L. Rosencrans, Luke Rosencrans and William D. Crunk were the only persons present at those two conversations. They were there when the conversations took place, except that W. D. Crunk was not present all the time, and John and Luke Rosencrans were. The policy of insurance was then in the Posey County Bank. At that time Mr. Smith told me to send the plans and specifications of the house and the proofs of loss to Chicago ; that Mr. Rosencrans would furnish me a printed envelope to send them in ; that Mr. Rosencrans had no right to receive them, and that they must be sent by me to the company at Chicago, and I must put it into the postoffice myself. Mr. Smith said to me that he required plans and specifications of the house burned. I told him I was ready to furnish them. I never made or furnished any plans or specifications. I tendered plans and specifications and proof of loss to Rosencrans two days after Smith was here, and he refused to take them."

Re-direct examination :

"Mr. Smith asked me if I had filed plans and specifications and proof of loss. I said I would file them in two days. He replied you can't file them that soon—it will take you thirty days. He told me I must send them to Chicago. I said I would file them day after to-morrow. He said if you do make them out they will not be right, and said he would send them back, and keep sending them back until they were right. I said I am ready to file papers to Rosencrans, and Rosencrans

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said he would not take them; that he had nothing of that kind to do; that he would furnish me a printed envelope for me to send them to Chicago, and I must mail it myself at the postoffice. Mr. Smith said he would return them as long as I sent them, if they were not right."

In considering the sufficiency of the evidence to sustain the decision of the circuit court, in overruling appellant's demurrer to appellees' evidence, it must be borne in mind that, by its demurrer, appellant admitted all facts of which there was any evidence, and all conclusions which can, fairly and logically, be drawn from such facts. In passing upon and deciding the questions presented by a demurrer to the evidence, the court must consider not only all the facts which the evidence tends to establish, but also all such fair and reasonable inferences of fact, as the jury, if trying the cause, might have lawfully drawn from such evidence. The rule as we have stated it, which controls in the consideration and decision of a demurrer to evidence, is declared in and sustained by many of our reported cases. *Trimble v. Pollock*, 77 Ind. 576, and cases cited; *Willcuts v. Northwestern Mutual Life Ins. Co.*, 81 Ind. 300, and cases cited; *McLean v. Equitable Life Assurance Society, etc.*, 100 Ind. 127 (50 Am. R. 779), and cases cited; *Lake Shore, etc., R. W. Co. v. Foster*, 104 Ind. 293 (54 Am. R. 319).

In the case last cited, in laying down the rules to be applied by the courts, in passing upon a demurrer to evidence, the *first* rule is thus stated: "*First*. A demurrer to the evidence admits all facts which the evidence tends to prove, or of which there is any evidence, however slight, and all inferences which can be logically and reasonably drawn from the evidence." See, also, the numerous authorities there cited in support of this *first* rule.

Having thus stated the rules which must govern us, in passing upon appellant's demurrer to appellees' evidence, we pass now to the consideration and decision of the particular points or questions, upon which appellant's counsel rely,

with much apparent confidence, for the reversal of the judgment. We have already stated, but will here repeat, what we regard as the principal point, urged by appellant's counsel for the reversal of the judgment herein, in their own language, as follows: "It was necessary, before plaintiffs could recover, for them to show that the assured had complied with the conditions of his policy, which required him to render a particular account of his loss, signed and sworn to by him, stating whether any and what other insurance had been made on the same property," etc. Appellees alleged in their complaint, as we have seen, that the assured fully performed all the conditions of the policy on his part. The condition of the policy, to which appellant's counsel refer in the above quotation from their brief of this cause, reads as follows: "Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and, as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property," etc. The "particular account of such loss," mentioned in the foregoing condition, is what is known, in common parlance, as the "proofs of loss." Appellant's counsel claim that the evidence wholly fails to show any compliance by the assured with the foregoing condition of his policy. If this claim of counsel is sustained by the record, then the trial court erred in overruling appellant's demurrer to the evidence, and the judgment below must be reversed.

The first question for our decision, under the law, therefore, may be thus stated: Is there any evidence, however slight, in the record of this cause, which tends to prove, or from which the triers of the facts might logically and reasonably infer, that, at the proper time, the assured had substantially complied with the foregoing condition of his policy, by rendering to the appellant the particular account or proper proof of his loss? We are of opinion that this question ought to be and must be answered in the affirmative. The

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policy of insurance was in evidence, and it showed upon its face that J. L. Rosencrans was "the duly authorized agent of the company, at Mount Vernon, Indiana," and that he there countersigned and issued the policy to the assured, on the 9th day of February, 1882. From this evidence, the trier of the facts might reasonably infer that appellant's agent had, by complying with the provisions of section 3765, R. S. 1881, in force since March 3d, 1877, obtained from the auditor of state the proper certificate of authority "to take risks or transact any business of insurance in this State," in the name of appellant and as its agent. Other evidence in the record tended to prove that Rosencrans continued to act as the duly authorized agent of appellant, until some time after the loss by fire of the property insured by the policy sued on herein.

There is evidence, also, tending to prove that the assured promptly notified appellant's agent, Rosencrans, of the loss of his dwelling-house by fire. No objection is made by appellant's counsel to this notice, and it may be assumed, therefore, that, in so far as notice of the loss to the company was concerned, the giving of such notice to its agent, Rosencrans, was a sufficient compliance by the assured with the aforesaid condition of the policy. By the terms of the same condition, the particular account of his loss was, also, to be rendered to the company. Upon this subject, the assured testified: "I tendered plans and specifications and proof of loss to Rosencrans, two days after Smith was here, and he refused to take them." Elsewhere, it appeared that Rosencrans was probably acting under the instructions of Smith, the adjuster, in refusing to receive the proof of loss, when tendered by the assured. According to the evidence, Smith was apparently determined to baffle the assured, and keep him out of the money due on his policy. It was insisted by Smith that the assured must send the proof of loss to him, at Chicago, Illinois; but this was not required by the terms of the policy, and certainly, in the absence of contract, it was never contemplated by our statute, under which Rosencrans was au-

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thorized as appellant's agent to transact its business of insurance in this State.

Under our statute, there can be no doubt, we think, that, where a condition of the policy requires that notice of the loss shall be given to the company, the giving of such notice to the duly authorized agent of a foreign insurance company, doing business in this State, will be a sufficient compliance with the terms of such condition. In *Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294 (10 Am. R. 111), it was held "that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation." In *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1, after quoting the rule on the subject of notice to an agent of a corporation, as stated in the case last cited, the court said: "It seems to us that this rule of law is especially applicable to the agents of foreign insurance companies, transacting the business of insurance for their companies in this State, and that it must be held that notice to such agents, in relation to any business of insurance transacted by them for their companies, is notice to such companies." Upon the points stated in this quotation, the case last cited has been approved and followed in *Willcuts v. Northwestern Mut. Life Ins. Co.*, *supra*, and in *Etna Ins. Co. v. Shryer*, 85 Ind. 362.

We know of no good reason why it should not be held, also, where a condition of the policy, as in the one under consideration, requires that the assured shall render the particular account of his loss to the company, and not to any specified officer or person, or at any specified office or place, that the rendering of such particular account of his loss by the assured, to the duly authorized agent of a foreign insurance company, will constitute a sufficient compliance by the assured with the terms of such condition. Text-writers and courts agree in saying that the agent of an insurance company may waive the rendering by the assured of the particular account or proofs of his loss, and that such waiver may be implied by, or inferred from, the facts and circumstances of the

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case. *Ætna Ins. Co. v. Shryer*, *supra*, and authorities cited. *A fortiori* should it be said, we think, that the tender by the assured of his proofs of loss to the agent of a foreign insurance company, who countersigned and issued to the assured his policy, and who, so far as appears, was the only officer or agent of such company in this State, and the unexplained refusal of such agent to accept such proofs of loss without objection thereto, was a sufficient compliance by the assured with the condition of his policy. Certainly, it must be said, under the rules of law applicable to the case as here presented, that there is evidence in the record which tends to prove, and from which the court or jury might reasonably infer the fact, that the assured had substantially complied with the conditions of his policy, both in giving notice and in rendering the particular account of his loss to the company.

But it is claimed, that appellees can not recover because they failed to put in evidence the plans and specifications, and proofs of loss, mentioned in the testimony of the assured. Doubtless, appellant had the right to object to this testimony, and to insist that no evidence should be heard in relation to the plans and specifications, and the proofs of loss, until they were produced at the trial, or satisfactory reasons given by appellees for their non-production. Appellant made no objection to the testimony of the assured, and did not, as it might have done, call for and put in evidence the plans and specifications, and proofs of loss, mentioned by the assured.

Appellant's counsel say: "There can be no presumption that these papers were sufficient, when the plaintiffs, having them in their possession, or, at least, having the assured, in whose possession they were, present and testifying on the trial, failed to put them in evidence." This argument, however may be used with equal force against the appellant, thus: It may be fairly presumed against the appellant, "that these papers were sufficient," both in form and substance, because "having the assured, in whose possession they were, present and testifying on the trial," under cross-examination by its

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learned counsel, appellant did not ask the assured to produce "these papers," and "failed to put them in evidence."

It was shown by the evidence, as we have seen, that the assured tendered his plans and specifications, and the proofs of his loss, to appellant's agent, Rosencrans, who refused to receive them, but made no objection, so far as the record shows, to either their form or substance. From the evidence, therefore, the court might have reasonably inferred that the plans and specifications, and proofs of loss, so tendered by the assured, were such as were called for by the conditions of his policy, and substantially complied with such conditions. *Indiana Ins. Co. v. Capehart, ante*, p. 270.

But it is claimed that Rosencrans was the agent of the assured, and not of the appellant, by reason of the following condition in the policy, namely: "It is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in the policy, and not of this company under any circumstances whatever, or in any transactions relating to this insurance." As applied to Rosencrans and the policy here in suit, the condition quoted is, we think, absolutely null and void. By the terms of the policy, its validity and binding force were made to depend upon the counter-signature of J. L. Rosencrans, "the duly authorized agent of the company, at Mount Vernon, Indiana." The condition quoted, no doubt, "crouched unseen in the jungle of printed matter, with which a modern policy is overgrown;" and it is a question, upon which the authorities are not strictly in harmony, whether such a condition can be made available as a defence for the company, after the loss has happened against which the policy professed to guard. *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434.

In *Patridge v. Commercial Fire Ins. Co.*, 17 Hun, 95, in speaking of a condition very similar to the one last quoted, it is vigorously said by the Supreme Court of New York:

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"It is true that the policy contains that common provision that any person, other than the assured, who may have procured the insurance, is to be deemed an agent of the assured, and not of the company. This is a provision which deserves the condemnation of courts, whenever it is relied upon to work out a fraud, as it is in this case. The policy might as well say that the president of the company should be deemed the agent of the assured. * * * Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by his agent's acts. Whether one is an agent of another is a question of mixed law and fact, depending on the authority given expressly or impliedly. And when a contract is, *in fact*, made through the agent of a party, the acts of that agent in that respect are binding on his principal." *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

In the case in hand, we are of opinion that there is evidence in the record which tended to prove, and from which the court or jury might reasonably infer, that Rosencrans was, and continued to be, in fact and in law, the duly authorized agent of appellant, and not of the assured.

The last point made by appellant's counsel, which needs to be considered under the rules of law applicable to this case, is thus stated: "There was no evidence whatever of the value of the house, or of the furniture that was burned,—no evidence that either was of any value. There is an entire absence of proof upon this question." The point thus made by counsel seems to be sustained by the record of this cause. If the question of excessive damages, or of error in the assessment of the amount of appellees' recovery, had been properly saved in the record and presented here by a proper assignment of error, appellant might, perhaps, have been in a condition to complain here of the assessment of appellees' damages, but this point we need not and do not decide, as the question is not before us. All that we need to decide is

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that, upon the case made by the evidence set out in appellant's demurrer, appellees were entitled to at least nominal damages. Where there is a demurrer to evidence and a joinder, the court may have the damages assessed by the jury conditionally; or the jury may be discharged, leaving the damages to be assessed by another jury, should the demurrer be overruled. *Andrews v. Hammond*, 8 Blackf. 540; *Lindley v. Kelley*, 42 Ind. 294; *Strough v. Gear*, 48 Ind. 100.

In the case under consideration, when appellant demurred to appellees' evidence, the jury was discharged, leaving the damages to be assessed by another jury, if the demurrer should be overruled. The record shows, that after the demurrer to the evidence was overruled, the assessment of appellees' damages was submitted to the court, neither party asking for a jury. The record is silent as to whether or not any evidence was heard by the court on the question of appellees' damages. In such a case, we must presume, in aid of the finding and judgment, that all proper and necessary evidence was heard by the court on the question of the assessment of appellees' damages.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Dec. 17, 1886.

108	530
126	121
126	503

108	530
124	276
126	449

108	530
145	256

108	530
151	591

No. 11,903.

THE CITY OF INDIANAPOLIS v. EMMELMAN.

CITY.—*Negligence.*—*Excavation in Stream at Street Crossing.*—*Knowledge that Children Play in Vicinity.*—*Safeguards.*—*Liability.*—Where a city, while constructing a bridge, makes an excavation in the bed of a shallow stream where it is crossed by a street, and constructs a levee from the bank to the pit, and, knowing that the children of persons residing near are accustomed to play in the vicinity, leaves it, in the absence of workmen, without safeguards of any kind, by reason of which a child five

108	530
170	173
170	177

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years old while at play, without any fault on the part of its parents, falls into the pit and is drowned, it is liable in an action for damages.

SAME.—Evidence.—Safety of Stream Prior to Excavation.—Where, on the trial of the action, the mother testified to the general character of the stream and to its comparative safety for children before the excavation was made therein, further testimony that she had never, before the death of her child, heard of any one being drowned in the stream, is admissible.

SAME.—Liability for Injury to Child.—The liability of a city is the same where a child, rightfully in a street, sustains an injury from a defect created therein by the city, as where an adult, who is free from fault, is injured from a like cause.

SAME.—Negligence of Parents.—Negligence can not be imputed to parents who permit a child of tender years to go to a place where it has a right to be, and at which there is no reason to suspect danger, and which is safe, unless another is guilty of a breach of duty.

From the Marion Superior Court.

C. S. Denny, D. V. Burns and W. L. Taylor, for appellant.
J. S. Duncan, C. W. Smith and J. R. Wilson, for appellee.

MITCHELL, J.—This action was brought against the city of Indianapolis by Henry Emmelman, to recover damages for wrongfully causing the death of the plaintiff's infant son.

The complaint charges that, on the 23d day of July, 1883, the city of Indianapolis was engaged in constructing a bridge over Pleasant run, a small stream of water running through a portion of the city, at a point where Spruce street crossed the above mentioned stream. It is alleged that preparatory to the erection of the proposed bridge, the city caused a deep square hole to be dug in the bed of the stream, which hole had abrupt perpendicular sides, and which became and remained filled with water. During the progress of the work, the city constructed a levee or dam from the edge of the stream out to the hole, so as to prevent the water from standing in the bed of the stream between the hole and the north bank, and in such manner as to afford an easy approach over the levee to the pit or hole.

It was averred further that a large number of families, having small children, resided in the immediate neighborhood

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of the crossing of Spruce street over the stream, and that many small children were accustomed to play in that vicinity, which fact was well known to the defendant.

The water outside of the hole was only a few inches in depth, yet the defendant, notwithstanding it knew all the facts, negligently failed to place any barriers or warning of danger about the pit, so as to prevent children from falling in, when its workmen quit the premises.

The complaint avers that the plaintiff had no knowledge of the existence of the pit, or of any danger in the vicinity, and that the boy was too young, being about five years old, to appreciate the danger. That on the date first above mentioned, the plaintiff's son, without any fault whatever on the part of the plaintiff, while the hole was so negligently left unguarded and exposed, fell into the pit and was drowned.

A demurrer to this complaint was overruled, and the propriety of this ruling is the first question presented.

The initial proposition upon which the appellant rests its argument against the sufficiency of the complaint is, that it does not appear from the facts averred that the city was guilty of any breach of duty, in respect to the plaintiff or his child. That the liability of the city can only be affirmed upon the theory that it has violated its duty in the premises, is too clear for serious controversy.

Speaking upon the subject as applied to an adult, this court, in the case of *Evansville, etc., R. R. Co. v. Griffin*, 100 Ind. 221 (50 Am. R. 783), used the following language: "Before it can be affirmed that the appellant was negligent, with respect to the transaction concerning which its omission is imputed to it as wrongful, it must appear that it was under some legal duty or obligation to the plaintiff, at the time when and place where the injury occurred, which was left undischarged. If it is liable at all, this is the foundation upon which its liability rests." *Lary v. Cleveland, etc., R. R. Co.*, 78 Ind. 323 (41 Am. R. 572).

In respect to cases such as we are considering, a learned

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author says: "It is important to bear in mind, in actions for injuries to children, a very simple and fundamental fact, which in this class of cases is sometimes strangely lost sight of, viz., that no action arises without a breach of duty." 2 Thomp. Neg., p. 1183, note.

With this rule in view, and with the further concession that in dealing with cases which involve injuries to children, courts and juries have sometimes strangely confounded legal obligation with sentiments that are independent of law, it must nevertheless be kept in mind that wherever an adult may be without incurring the imputation of being an intruder, a child may also go, free from the like imputation. The same circumstances which would justify a recovery by one who had reached years of discretion, and had sustained an injury from the act of another, while free from fault, would justify a recovery by an infant of such years as to be incapable of fault, provided its parents or guardian were also guilty of no neglect which could be imputed to the child. And so conversely, except when a child is seen in time so that injury to it might be avoided, persons who are lawfully using, or carrying on business on their own premises, are not liable for injuries to children, unless under the same circumstances they would have been liable to others who were equally free from fault.

The conclusion to be drawn from the approved cases on the subject is, that the owner of premises, who has neither expressly nor impliedly invited the public to come upon or pass over his grounds, is under no legal obligation to keep them free from pitfalls, or in a condition of safety, for those who in the pursuit of their own pleasure or convenience pass over such premises, even though it be with the acquiescence of the owner. Persons passing over premises of that description exercise the privilege with its attending perils, and this without distinction as to whether or not they have arrived at an age of discretion.

Unless contrivances are placed on such premises, with an actual or constructive intent to hurt intruders, the proprietor

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is not liable for injuries resulting to persons, by reason of the condition in which the premises have been left, or from the prosecution of a business thereon, in which the owner had a right to engage. *Evansville, etc., R. R. Co. v. Griffin*, 100 Ind. 221, 225, and cases cited; *Gillespie v. McGowan*, 100 Pa. St. 144; *Gramlich v. Wurst*, 86 Pa. St. 74 (27 Am. R. 684); *Cauley v. Pittsburgh, etc., R. W. Co.*, 95 Pa. St. 398 (40 Am. R. 664); *McAlpin v. Powell*, 70 N. Y. 126 (26 Am. R. 555); *Hargreaves v. Deacon*, 25 Mich. 1; *Burdick v. Cheadle*, 26 Ohio St. 393 (20 Am. R. 767).

The foregoing and many other analogous cases, which might be cited, proceed upon the theory that the person sought to be held liable, had done nothing to produce injury to others who voluntarily strayed upon or invaded the premises on which the injury occurred.

In all such cases the owner may dig an excavation in his own land, not substantially adjoining a public highway, and no action lies against him by one who has fallen into the excavation. *Hardcastle v. South Yorkshire R. W. Co.*, 4 Hurlst. & Nor. 67; *Hounsell v. Smyth*, 29 L. J. 203 (7 C. B. N. S. 731); *Pittsburgh, etc., R. W. Co. v. Bingham*, 29 Ohio St. 364 (23 Am. R. 751); *Sweeny v. Old Colony, etc., R. R. Co.*, 10 Allen, 368; *Knight v. Abert*, 6 Pa. St. 472; *Nicholson v. Erie R. W. Co.*, 41 N. Y. 525.

But there is a clear distinction between the cases cited and the case where an excavation is made in or so near a highway as that one, while rightfully using the highway, may, without fault, sustain injury by falling into the excavation. Not less clear is the distinction between a case in which an excavation is made, or something calculated to amuse or attract children is done or left, at a place where the child has a right to be, and one in which the same thing is done at a place where, in order to reach the place of danger, the child becomes an intruder upon the premises of another.

Whoever while passing along, or when properly in a public street, suffers an injury, while exercising the degree of care

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which the law requires of such persons, by falling into an excavation which has been made in or near such street, is entitled to maintain an action for such injury against the person making the excavation. In such a case, the person making the excavation comes under an obligation to make it safe in respect to all persons who have a right to use the street.

Streets are open to persons of all ages, and children are and must be permitted to some extent at least, to go upon the streets of towns and cities, without incurring the imputation of negligence upon themselves or their parents. It would be intolerable to hold as matter of law, that a parent, having no knowledge of the presence or probability of danger, was nevertheless guilty of negligence in permitting a five-year-old child to pass beyond the door yard into the street without an attendant. Whoever, therefore, does anything in, or immediately adjacent to a public street, calculated to attract children of the vicinity into danger, which they can not appreciate, owes the duty of protecting them by suitably guarding the source of danger, or in case this is impracticable, by giving timely warning to their parents and guardians of the existence of the danger. *City of Chicago v. Hesing*, 83 Ill. 204 (25 Am. R. 378); *City of Chicago v. Major*, 18 Ill. 349; *Niblett v. Nashville*, 12 Heisk. 684 (27 Am. R. 755); *Graves v. Thomas*, 95 Ind. 361 (48 Am. R. 727); *McAlpin v. Powell*, *supra*; *Beck v. Carter*, 68 N. Y. 283 (23 Am. R. 175); 2 Dillon Mun. Corp., section 1005.

The right of a child to go or be in or upon a street is in no way dependent upon the occupation or pecuniary condition of its parents. *Mayhew v. Burns*, 103 Ind. 328.

If a person of discretion, while attempting to pass over the stream in question, where it crossed Spruce street, had fallen into the pit into which the child fell, no doubt could be entertained that such person, if free from contributory fault, might have recovered for an injury sustained, or if the plaintiff, without knowledge of the pit, had permitted his horse to

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go there for water, and it had fallen into the unguarded hole and had been injured, the liability of the city would have been beyond question.

As we have seen, the liability of the city is precisely the same in case a child, rightfully in a street, sustains injury from a defect created therein by the city, as in the case of an adult, who is injured while free from fault, from a like cause.

It would shock all sense of justice to hold that a city might dig a pit in a street and leave it so that children might be lured into it, and yet deny to parents, who were without fault, any remedy for the loss of a child.

Considered in the light of what has been said, it seems clear to us that the demurrer to the complaint was properly overruled.

The excavation into which the appellee's son fell was made in Spruce street, at a point where it crosses Pleasant run. It was made in the bed of a shallow stream, and left alone unguarded on a July day, with knowledge that children were accustomed to play in the vicinity. The city must be held to know that children are attracted to such a place in July weather. They were not intruders. It was gross carelessness on the part of the city, with such knowledge, to leave an unguarded pit filled with water, in the street, into which an unsuspecting child might fall.

Any inference of neglect on the part of the appellee, which might otherwise have arisen, is repelled by the averment that both he and his wife were ignorant of the existence of danger at the place in question, and by the general averment that both the parents and son were without fault.

Upon issues made the case was tried by a jury, who returned a general verdict for the plaintiff, assessing his damages at \$700, and also returned answers to interrogatories, which need not be further noticed, except to say they contain nothing which controls the general verdict.

It is next contended that the evidence fails to sustain the finding of the jury. It would serve no useful purpose to re-

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hearse the testimony to any extent. An examination of it has led us to the conclusion that all the material averments of the complaint are fairly proved by the evidence.

Conceding all that has been contended for in respect to the condition of the pit, the levee, and the street and run at the time and place of the sad occurrence, the fact remains that the city made an excavation in a street, at a place where it knew children living in the vicinity were accustomed to play, and where they had a right to be, at all proper times, without being intruders upon the premises, or invaders of the rights of any one.

In the absence of the workmen, that the children went into the shallow stream to play, was precisely what the appellant might have expected. It owed them the duty to guard the pit in the street so that they might not fall into it and perish. Neither the father nor mother knew of, nor had they reason to suspect, any danger at the place in question. It was, therefore, not negligence to permit the child to be, with another, as the mother supposed it was, at such a place so near its home.

Over the appellant's objection the court permitted the appellee's wife to testify that she had never before the drowning of her son heard of any one being drowned in Pleasant run. In connection with all the other circumstances testified to by the witness, showing the character of the stream, and its comparative safety for children before the excavation was made, this was not objectionable.

Certain instructions were asked by the appellant and refused by the court. Without further reference to the instructions asked and refused, it may suffice to say, within the principles already referred to upon the subject of the appellant's duty and the circumstances under which the appellant would be guilty of contributory negligence, the instructions were properly refused.

Cases which impute negligence to parents who permit children of tender years to wander unattended in the vicinity of

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and upon railroad tracks, or other places of known or probable danger, are not controlling in a case where, as here, a child is permitted to go to a place at which there is no reason to suspect danger, and which would have been safe but for the breach of duty of the appellant.

We find no error.

The judgment is affirmed, with costs.

Filed Nov. 16, 1886; petition for a rehearing overruled Dec. 17, 1886.

108 538
128 415
128 417

108 538
130 40
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128 415

108 538
149 300

108 538
170 491

No. 12,481.

THE WESTERN UNION TELEGRAPH COMPANY v. BROWN.

TELEGRAPH COMPANY.—*Section 4176, R. S. 1881.—Repeal of by Implication by Act of 1885.*—Section 4176, R. S. 1881, relating to the duty of telegraph companies in the transmission of messages, and providing penalties, was repealed by implication by the act of April 8th, 1885 (Acts 1885, p. 151), on the same subject.

SAME.—*Penalty.—Repeal of Act Providing, Does Not Prevent Recovery.*—Under section 248, R. S. 1881, the repeal of a statute providing a penalty does not extinguish a right of action which accrued thereunder, unless the repealing act expressly so provides. The act of 1885 not so providing, section 4176 is to be treated as in force for the purpose of sustaining an action to recover a penalty incurred before its repeal.

SAME.—*Sender of Message.—Right of Action.—Quære.*—Under section 4176 only the sender of a message could maintain an action for the penalty therein provided. *Quære*, whether the right of action is extended by the act of 1885.

SAME.—*Burden of Proof.—Special Finding.*—The burden is upon the plaintiff, in an action for the penalty, to show that he was the sender of the message, and if there is a special finding of facts, the fact that he was the sender must affirmatively appear.

SAME.—A finding that the plaintiff, Alonzo F. Brown, delivered to the telegraph company, and paid for the transmission of, a message signed "L. F. Brown," is not a sufficient finding that the plaintiff was the sender.

SUPREME COURT.—*Special Finding.—New Trial.—Mandate on Reversal of Judgment.*—Where there is a special finding of facts and conclusions of

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law, the Supreme Court, on reversing the judgment, will remand the cause for a new trial where justice requires it, instead of for judgment on the facts.

From the Vigo Circuit Court.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.
S. C. Stimson and R. B. Stimson, for appellee.

ZOLLARS, J.—Appellee was awarded judgment below against appellant for the statutory penalty as provided by section 4176, R. S. 1881, being section 1 of an act passed in 1852, for a failure to transmit a message in proper time.

Appellant's counsel contend that the act of 1885, Acts 1885, p. 151, by implication, repealed the above section of the act of 1852, and that that repeal took away all right to the penalty, although a penalty in a like amount is provided by the act of 1885, for a violation of its provisions.

Section 4176, *supra*, reads as follows:

“Every electric telegraph company with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and, on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed: *Provided, however,* That arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from offices of justice shall take precedence of all others.”

The act of 1885 is as follows:

“An act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency.

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"Section 1. *Be it enacted*, * * * * That every telegraph company with a line of wires wholly or partly within this State, and engaged in doing a general telegraphic business, shall during the usual office hours receive dispatches, whether from other telegraph lines or other companies, or individuals, and shall, upon the usual terms, transmit the same with impartiality and in good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged or words or figures charged for or manner or conditions of service between any of its patrons, but shall serve individuals, corporations and other telegraphic companies with impartiality: *Provided, however*, That arrangements may be made with the publishers of newspapers for transmission of intelligence of general and public interest out of its order, and that communication for and from officers of justice shall take precedence of all others. * * * * *

"Section 3. Any person or company violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offence, to be recovered in a civil action in any court of competent jurisdiction: *Provided*, Nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations by injunction or otherwise."

In our judgment, this later act operated as a repeal of the above section 4176. The title is comprehensive, and clearly indicates an intention on the part of the Legislature to revise the whole subject of penalties against telegraph companies for a failure to transmit messages promptly and with impartiality.

The act also covers the whole subject-matter, is different and more comprehensive in its terms than section 4176, and contains provisions not found in that section, and that are not reconcilable therewith.

When such is the case, the later act repeals the former upon the same subject. *State v. Christman*, 67 Ind. 328, and

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cases there cited; *Lindsay v. Lindsay*, 47 Ind. 283; *State v. Horsey*, 14 Ind. 185; *DePauw v. City of New Albany*, 22 Ind. 204; *Coghill v. State*, 37 Ind. 111; *Dowdell v. State*, 58 Ind. 333; *Hayes v. State*, 55 Ind. 99; *Wright v. Wright*, 97 Ind. 444; *State, ex rel., v. Board, etc.*, 104 Ind. 123; *Hadley v. Musselman*, 104 Ind. 459.

Section 4176 required that messages should be transmitted promptly and with impartiality, whether received from other telegraph companies or from individuals, but the penalty was only for a failure to transmit the message, or the postponing of it out of its order. It also provided that the penalty might be recovered by the person whose dispatch was neglected or postponed.

The act of 1885 provides that messages shall be transmitted promptly and with impartiality whether received from other telegraph lines or other companies, or from individuals, and that the company "*shall in no manner discriminate in rates charged or words or figures charged for or manner or conditions of service between any of its patrons.*" It further provides, that any person or company violating *any of the provisions* of the act shall be liable to *any party aggrieved* in a penalty of \$100 for each offence, etc. The portions above italicized show the difference between the two acts.

In the act of 1852, section 4176, *supra*, the penalty, as we have seen, is alone for the failure or delay in the transmission of the message.

In the act of 1885, the penalty may be recovered also for any forbidden discrimination. The act of 1852, section 4176, *supra*, as interpreted by this court, gave a right of action for the penalty to the sender of the dispatch only. *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Western Union Tel. Co. v. Kinney*, 106 Ind. 468.

Whether or not the act of 1885, by the use of the term "party aggrieved," extends the right to the penalty to any

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one except the sender of the dispatch, is a question we need not here decide.

The message which gave rise to this action was delivered to the company on the 2d day of December, 1883. The action was commenced in December, 1884, and tried in July, 1885. It will thus be seen, that the action is to enforce a penalty incurred, if at all, under the above section 4176, and that the action was pending when the act of 1885 took effect. on the 8th day of April, 1885.

There is no vested right in a penalty. The general rule is, that an action can not be maintained to recover a penalty after the act giving it is repealed, unless it be saved by the repealing act. *Thompson v. Bassett*, 5 Ind. 535. There is no such saving clause in the act of 1885. It does not follow, however, that appellee's right of action for the penalty was lost with the repeal of section 4176. In 1877, an act was passed, the first section of which, amongst other things, provided as follows:

"And the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." R. S. 1881, section 248.

This statute clearly applies in the case before us. Whatever rights appellee may have had to the penalty under section 4176, therefore, are saved to him by this statute.

For the purposes of this action, in the recovering of that penalty, section 4176 is to be regarded as still in force.

The court, therefore, did not err in overruling the demurrer to appellee's complaint.

As appellee must recover the penalty, if at all, under section 4176, it follows that it must be made to appear that he was the sender of the dispatch within the meaning of that

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section as heretofore interpreted by this court, that is, it must appear that it was a message from him to some other person.

At the request of appellant, the trial court disposed of the case by a special finding of facts and conclusions of law thereon. The finding of facts as to appellee's connection with the dispatch is as follows:

"That on said December 2d, 1883, the plaintiff delivered to the agent of the defendant at said Union depot office, in Terre Haute, Indiana, for transmission to Crawfordsville, the following message, to wit:

"December 2d, 1883.

"*To T. D. Brown, Crawfordsville.*

"Please tell Dr. Brown, of Alamo, immediately, that Duck is dead; died at ten this morning; be home 3d, on morning train. Have Frank Snyder at the Logansport depot with hearse and one cab for Alamo. L. F. BROWN."

"That at the time said message was delivered, the plaintiff paid to said agent the sum of eighty cents, being the amount demanded by said agent for sending said message," etc.

This is not a finding that appellee was the sender of the dispatch. It is found that he delivered the dispatch to the company, and paid for the transmission, but that is not a finding that the dispatch was from him to T. D. Brown. He may have delivered the dispatch to the company, and paid for its transmission with his own money, and yet not be the sender of it, in the sense of the statute. *Western Union Tel. Co. v. Kinney, supra.*

The dispatch set out as a part of the special finding is signed "L. F. Brown," and there is no finding that the signature is that of appellee, Alonzo F. Brown.

It is by no means a necessary inference from the facts found that appellee was the sender of the dispatch. The burden was upon him to show that the dispatch was a message from him, and in order that he may recover upon the facts specially found, they must affirmatively show what he was thus bound to prove.

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"It is now well settled that where the finding is silent upon a material point it is to be deemed to be adverse to the party upon whom rests the burden of establishing that point." *Dodge v. Pope*, 93 Ind. 480.

"Under the rule declared in *Graham v. State, ex rel., etc.*, 66 Ind. 386, the special finding must be deemed to embrace all the facts which were proved, and all issues not determined by the facts found must be regarded as not proven by the party having the burden of the proof thereof." *Vannoy v. Duprez*, 72 Ind. 26. See, also, *First Nat'l Bank, etc., v. Carter*, 89 Ind. 317; *Dixon v. Duke*, 85 Ind. 434; *Johnson v. Putnam*, 95 Ind. 57; *Hedges v. Keller*, 104 Ind. 479; *Bass v. Elliott*, 105 Ind. 517; *Glantz v. City of South Bend*, 106 Ind. 305.

"Where the special finding is silent as to facts which a party is required to affirmatively establish, it will be presumed on appeal, that the evidence failed to establish such facts." *Mitchell v. Colglazier*, 106 Ind. 464.

We have no means of knowing what the evidence may have been.

If, in fact, the evidence showed that appellee was, in the sense of the statute, the sender of the dispatch, he should have seen to it that the fact was specially found, and definitely and affirmatively stated.

As the special finding of facts does not show that appellee was the sender of the dispatch, the conclusion of law, and the awarding of judgment for the penalty in his favor by the court below, are erroneous, and the judgment must be reversed.

Filed Sept. 15, 1886.

ON PETITION FOR A REHEARING.

PER CURIAM.—In reversing the judgment an order was made directing the court below to change its conclusions of law, and render judgment for appellant on the special finding of facts.

After considering the petition for a rehearing, we have reached the conclusion that the rights of the parties will be

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better protected by changing the mandate, and ordering that the judgment be reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to grant a new trial to appellee, if moved for; otherwise to render judgment for appellant upon the special finding of facts. This we have authority to do. *Parker v. Hubble*, 75 Ind. 580; *Yerkes v. Sabin*, 97 Ind. 141 (144); *Shannon v. Hay*, 106 Ind. 589.*

It is so ordered.

Filed Nov. 22, 1886; motion to modify mandate overruled Feb. 24, 1887.

No. 12,894.

MCCAMMON v. CUNNINGHAM.

INSANITY.—*Guardianship.*—*Capacity to Manage Estate.*—*Instructions.*—For a consideration of instructions to the jury upon the hearing of a proceeding to have a person adjudged of unsound mind and incapable of managing his estate, see opinion.

SAME.—*Meaning of Words "of Unsound Mind."*—The words "of unsound mind," as used in the statute, include every species of insanity or mental unsoundness.

SAME.—*When Guardian May be Appointed.*—The jurisdiction to appoint a guardian is not confined to cases of insanity, idiocy or lunacy, strictly so called, but extends to every case of mental unsoundness or imbecility, when it is clearly made to appear, of such a degree as to render its subject incapable of conducting the ordinary affairs of life.

INSTRUCTIONS TO JURY.—Where part of an instruction asked is incorrect, the whole should be refused.

From the Montgomery Circuit Court.

T. E. Ballard and *M. E. Clodfelter*, for appellant.

M. D. White and *W. S. Moffett*, for appellee.

* NOTE.—See *Buchanan v. Milligan*, ante, p. 433. REPORTER.

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MITCHELL, J.—The appellant instituted this proceeding under section 2545, R. S. 1881, to the end that it might be adjudged that the appellee was a person of unsound mind, and incapable of managing his own estate, and having in view further the appointment of a guardian to take the custody of the appellee's person, and the management of his estate.

Upon an issue made as the statute directs, a jury, after hearing the evidence and instructions of the court, returned as their verdict, "that the defendant, James Cunningham, is a person of sound mind and capable of managing his own estate."

It is now claimed that the verdict of the jury is contrary to the weight of the evidence, and that the conclusion reached resulted from the refusal of the court to instruct the jury properly as to the degree of mental unsoundness, which would have warranted a finding contrary to that returned.

The appellant at the proper time requested the court to instruct the jury, in substance, that the phrase "of unsound mind" as used in the statute did not necessarily imply insanity; that insanity is a stronger term and implies a greater degree of mental infirmity than is implied in the phrase "of unsound mind;" that the mental condition implied by the latter phrase meant any unsound state of mind, whether arising from sickness, disease, the infirmity of age or other like causes, which incapacitates a person from transacting his own business. This instruction was refused. As pertinent to the same subject, the court, upon its own motion, gave to the jury the statutory definition of the words "person of unsound mind." Section 2544, R. S. 1881. In the same connection the jury were further told, in substance, that one might be in a condition of mental weakness or feebleness, resulting from disease or old age, and yet not be a person of unsound mind. The jury were further instructed, substantially, that the mental unsoundness which would justify them

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in finding against the defendant, must be of such a character as to render him incapable of managing his own estate, and that if upon all the evidence in the case, they should find that the defendant was mentally unsound to such a degree as to be incapacitated to manage his own affairs, they should so return the facts to the court.

Precisely what was meant by the request to instruct the jury that insanity is a "stronger term" and implies a greater degree of mental infirmity than is implied in the phrase "of unsound mind," we are not advised. It may be that it was intended to convey the idea that insanity was a more vehement, vituperative or harsh expression, but it could hardly have been intended that it was more comprehensive, or that it embraced a degree of mental infirmity which was not included in the statutory definition of the words "of unsound mind." These words necessarily include every species of insanity or mental unsoundness, and it is not, therefore, in a legal sense, correct to say that insanity is the "stronger term." *Willett v. Porter*, 42 Ind. 250; *Eggers v. Eggers*, 57 Ind. 461.

Since that part of the instruction above referred to was not a correct statement of the law, the whole was properly refused, notwithstanding the latter part, if it had been tendered alone, might with propriety have been given.

It may be proper to add that the jurisdiction of the court to appoint a guardian is not confined to cases of insanity, idiocy or lunacy, strictly so called, but extends to every case of mental unsoundness or imbecility, which has reached such a degree, from whatever cause, as renders its subject incapable of conducting the ordinary affairs of life, and leaves him in a condition to become the victim of his own folly, or the fraud of others. But in no case should the benevolent purpose of the statute be abused, by the assumption of jurisdiction over the person or property of another, until such a degree of mental unsoundness is clearly made to appear. *Lackey v. Lackey*, 8 B. Mon. 107; *Buswell Insanity*, 4.

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An examination of the evidence discloses that the verdict of the jury was amply sustained. There was no error.

The judgment is affirmed, with costs.

Filed Dec. 17, 1886.

108	548
124	189

108	548
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129	84

108	548
145	205
146	602

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149	354
108	548
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169	644

12,372.

THE LAKE ERIE AND WESTERN RAILWAY COMPANY v. ACRES.

COMMON CARRIER.—*Refusal to Carry Passengers.*—*Action in Tort.*—The wrongful refusal or failure of a common carrier to carry passengers is a tort for which an action will lie.

NEW TRIAL.—*Excessive Damages.*—*Torts.*—The fourth statutory cause for a new trial, namely, "that the damages are excessive," is proper only in cases of torts.

SAME.—When the action is in tort the verdict of the jury will not be disturbed on the ground of excessive damages, unless they are so outrageous as to strike every one with their enormity and injustice, and as to induce the belief that the jury must have acted from prejudice, partiality or corruption.

PRACTICE.—*Theory of Case.*—*Supreme Court.*—The theory upon which a case proceeds in the trial court will prevail in the Supreme Court.

From the Tippecanoe Superior Court.

H. W. Chase and F. S. Chase, for appellant.

J. R. Coffroth and T. A. Stuart, for appellee.

ELLIOTT, C. J.—This action was instituted by the appellee against the appellant to recover damages for refusing and neglecting to carry him and his family to a station on the line of appellant's railroad, for which he had purchased tickets.

The evidence, so far as it is material to the question presented, is substantially this: When the conductor of the train took the tickets from the appellee, he directed the appellee and his family to leave the car in which they were seated and

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enter a car in front, as that car would be left at Boswell, one of the company's stations; that they attempted to obey this order by passing through the train, but were required to get off the train; they left the car in which they were seated, attempted to get on to the front car as directed at the small station of Boswell, where the train halted; the car in which the appellee and his family were seated was not left at Boswell, but was taken on with the train. The appellee put his hand on the conductor's shoulder, as the train was about to start, and said to him, "Hold on, we are not on yet," but the conductor paid no attention to him, and gave the signal for the train to move on. After the train left the appellee and his family at Boswell, they started to go into the depot, but the agent would not permit them to remain there, and he then took his family to the hotel, and walked four miles, to Talbot, the station for which he had taken passage, and got his wagon and team, which he had left there to await his return from Lafayette, where he entered the train. He drove back to Boswell, got his family, and drove to his home, reaching it between two and three o'clock in the morning. The appellee caught a severe cold from exposure, as did his wife, she being incapacitated from doing any work for two weeks.

The jury awarded the appellee seven hundred dollars damages, and the appellant moved for a new trial, assigning as a cause that "the damages are excessive." The only point, as counsel for the appellant say, "that is available for the appellant, is that the damages are excessive."

It is insisted by the appellee's counsel that the action is not for a breach of contract, but that it is an action to recover damages for a tortious breach of duty, and that it is so recognized and treated in the motion for a new trial. The position of appellee is substantially this: If the action is for a breach of contract, then there is no cause assigned in the motion for a new trial presenting the question of error in the amount of recovery, for, in such cases, the cause for a new trial should be stated as "error in the assessment of the

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amount of recovery," and that, as the cause assigned is that the "damages are excessive," the appellant must be deemed to have acted upon the theory that the action is to recover damages for a tort. The decided cases support the contention of counsel, that the fourth of the statutory causes for a new trial, namely, "that the damages are excessive," is proper only in cases of torts. *Dix v. Akers*, 30 Ind. 431; *Frank v. Kessler*, 30 Ind. 8; *Buskirk* Pr. 234. It follows, therefore, that the appellant tried the case below upon the theory that it was one of tort, and so treats it here, for the theory adopted there governs here. *Carver v. Carver*, 97 Ind. 497. Either this result follows, or else the appellant has no cause in his motion presenting the question counsel say is the only available one.

It is the general rule, and one that has long prevailed in this State, that the wrongful refusal or failure of a common carrier to carry passengers is a tort for which an action will lie. *Cincinnati, etc., R. R. Co. v. Eaton*, 94 Ind. 474 (48 Am. R. 179); *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381 (45 Am. R. 464); *Toledo, etc., R. W. Co. v. McDonough*, 53 Ind. 289; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116 (10 Am. R. 103).

It may, perhaps, be true that it is not every case in which the refusal of a carrier to carry passengers who have rightfully entered its train to their destination can be deemed a tort, but we need not now attempt to distinguish between the cases—if, indeed, there is any ground for distinction—where the action will be deemed one for a breach of contract and one for the recovery of damages for a tort, for the appellant has treated the action as one in tort, and we must so decide it, and especially as there are facts which at least tend to constitute the wrong of the appellant a tort.

As the action is to be deemed one in tort, we can not, under a firmly established rule, interfere with the verdict of the jury unless the amount is so "outrageous as to strike every

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one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption." *Indiana Car Co. v. Parker*, 100 Ind. 181, see p. 196, and cases cited. *Wolf v. Trinkle*, 103 Ind. 355; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *Louisville, etc., R. W. Co. v. Pedigo*, ante, p. 481.

Judgment affirmed.

Filed Dec. 18, 1886.

No. 11,948.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. JONES.

NEGLIGENCE.—Complaint for Personal Injury.—General Averments of Negligence.—A complaint to recover for personal injury is sufficient to withstand a demurrer, under the statutes of this State, when it characterizes the act which resulted in the injury as having been negligently or carelessly done, without alleging the specific facts constituting the negligence.

SAME.—Railroad.—Derailment of Car.—Injury of Passenger.—Presumption of Negligence.—Rebutting Evidence.—Explanation as to How Accident Happened.—Where a passenger is injured by reason of the car in which he is being carried becoming derailed, a presumption of negligence arises against the railroad company, which stands with the force of actual proof until overthrown by evidence that the accident was inevitable or unavoidable. The company is not required to explain how the accident happened. It is only necessary for it to show that it had employed the utmost skill and prudence practicable in its business, and that the cause of the accident could not reasonably have been discovered and guarded against.

SAME.—Evidence.—Objection to Question.—Conversation with Engineer of Wrecked Train Remote from Scene of Accident.—Practice.—Where the trial court does not know from a question of a general character, calling for a conversation with the engineer of the train, at a station seven miles distant from the scene of the accident, whether the answer of the witness will or will not be competent evidence, it is not error to overrule

108	551
128	463
108	551
130	62
108	551
124	4
134	388
135	72
108	551
141	26
141	552
143	656
108	551
144	434
146	566
108	551
150	403
108	551
155	95
155	96
108	551
188	365
108	551
166	665

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an objection to the question, based on the ground that the conversation "was irrelevant and immaterial and not connected with anything that occurred at the accident." If the answer is not competent, error may be predicated upon a refusal to strike it out.

SAME.—Speed of Train Prior to Accident.—Non-Expert Witness.—Where negligence is charged in the running of a train at a high and dangerous rate of speed, it is competent for a non-expert witness, who saw the train one mile and a half from the place where the accident occurred, to state the rate of the speed at the point where his observation was made, at least in connection with the testimony of other witnesses that the speed had not been checked at the place where the accident occurred.

SAME.—Pre-Existing Disease.—Damages for Aggravation.—Where, by reason of the negligent acts of another, a person suffering from a pre-existing disease sustains an aggravation of his malady, he may recover to the extent of the injury thereby caused.

SAME.—Rate of Speed.—Right of Railway Company to Regulate.—In an action prosecuted by a passenger for an injury received by the derailment of a train running down grade, and around a curve, at a rapid rate of speed, an instruction asked that a railway company has the right to propel its trains at such a rate of speed as it sees fit, and that no rate of speed is negligence *per se*, should be refused.

EVIDENCE.—Objections to Admission Must be Specific.—Supreme Court.—Practice.—A general objection to the admission of evidence, stating no reason why it should be excluded, presents no question on appeal.

INSTRUCTIONS TO JURY.—How Considered.—Inaccurate Statements.—An instruction must be considered as a whole and in connection with the other instructions given, and if, when thus considered, the law is correctly stated, there is no available error in the fact that it contains some inaccurate statements.

SAME.—Repetition of Proposition.—When a rule of law applicable to the case is given in one instruction, it is not necessary to repeat it in another.

SUPREME COURT.—Weight of Evidence.—The Supreme Court will not reverse a judgment upon the weight of conflicting evidence.

From the Lawrence Circuit Court.

G. W. Friedley, G. W. Easley and W. H. Russell, for appellant.

M. S. Mavity, W. J. Throop, M. F. Dunn, R. Hill and R. N. Lamb, for appellee.

ZOLLARS, J.—It is alleged in appellee's complaint, that in June, 1882, appellant was the owner of a railroad, and en-

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gaged as a common carrier, in transporting passengers over the same for hire; that in that month she purchased a ticket from its agent at Orleans, in this State, by virtue of which, the consideration paid therefor, and the contract and agreement made by appellant, she became entitled to be safely and securely carried from Orleans to Greencastle Junction; and that possessing the ticket so purchased, and in pursuance of the agreement of appellant, she went upon one of its regular passenger trains at Orleans, and into a passenger coach forming a part of that train, to be carried from that station to Greencastle Junction.

That portion of the complaint which alleges appellee's injuries, and charges appellant with negligence, is as follows:

"And the said defendant ran its said train carelessly and negligently, at a high, unusual, and dangerous rate of speed, to wit, at the rate of fifty miles an hour. That said rate was not only dangerous on said road, to the life and limbs of all the passengers on said train, but that said train was thus carelessly, negligently and rapidly run on a down grade, without applying the brakes as should have been done, and over a defective and insufficient track, and over defective and insufficient rails, and over rails not properly spiked to the cross-ties, and over decayed, rotten and defective cross-ties, and over curves not properly elevated. And said defendant carelessly and negligently ran said train at said high and dangerous rate of speed, by pulling the same with a defective and insufficient locomotive, and with a locomotive that was not suitable for, and sufficient to draw a passenger train, at such high rate of speed, by reason of all of which acts of carelessness and negligence on the part of said defendant, so done and committed, and without any fault or negligence on the part of this plaintiff, said cars were, at and in the said county of Lawrence, and State of Indiana, by said defendant, its agents and employees, so carelessly and negligently run and managed as to throw said train and the locomotive thereto attached from said road, down a high embankment,

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among the trees and bushes, and against the ground, suddenly, while running at the high rate of speed aforesaid, and turned the car in which plaintiff was over on its side. And the plaintiff avers that by reason of said sudden and immediate derailment, and by the turning of said car on its side, and without any fault or negligence on her part, and while she was in her seat in the said coach, where she had a right to be, she was suddenly carried over said embankment, with said coach and train, thirty or thirty-five feet, among said trees and bushes, and against the ground aforesaid; that by reason of said great speed, and the derailment and turning over of said coach, the plaintiff was hurled forward against the seat, and upon the cornice and braces of the top part of the said coach, and struck her head against said cornice and braces with great force, which shocked her, and rendered her insensible, and injured her head and eye; that by reason of the aforesaid high rate of speed, and by the overturning of the said coach, other passengers therein were thrown violently upon this plaintiff, without any fault or negligence of hers, and she was greatly injured by said passengers being thrown upon her, and by being thrown upon and against said cornice and braces aforesaid, and by all of which her right arm was strained and injured, her hips and spine injured, whereby she was partially paralyzed, and her body otherwise cut, bruised and wounded, from all of which she has ever since suffered, and does still suffer, great bodily pain and mental anguish, and that she is, in consequence of said injuries so received, permanently disabled and rendered unable to attend to her household duties, and rendered unfit for any kind of business pursuit, or the comfortable enjoyment of life or limb; that in addition to her great suffering and disabilities, she has been put to great expense for surgical and medical attendance, nursing and medicine, in and about the attempted healing of said injuries, and became liable for the necessary fees therefor. And the plaintiff says that in consequence of said careless and negligent acts of the said

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defendant, its agents and employees, and without any fault or negligence on her part, she has been permanently injured in body and mind, her constitution weakened, her eyesight impaired, her health impaired, and her happiness destroyed. Wherefore she demands judgment for ten thousand (\$10,000) dollars."

Appellant's demurrer to the complaint was overruled. That ruling is one of the alleged errors upon which its counsel rely for a reversal of the judgment against it, in favor of appellee.

The main and general objections urged to the complaint by appellant's counsel are, that there is no averment that appellant, or its servants, were guilty of any careless act or omission in the actual running of the train; that there is no averment that the train left the track because of the curve, the insufficiency and imperfection of the locomotive, the rails, ties or track, nor that such insufficiency caused the injury, or contributed thereto.

In our own judgment, these objections, and others urged by counsel, have not such a basis upon which to rest, as requires a holding that the demurrer to the complaint should have been sustained.

The statute provides, that the facts constituting the cause of action shall be stated in the complaint in such a manner as to enable a person of common understanding to know what is intended. R. S. 1881, section 338. And that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties. R. S. 1881, section 376; *Dickensheets v. Kaufman*, 28 Ind. 251.

It is well settled, too, that a pleading must be taken as a whole, and construed according to its general scope and tenor. *Fleetwood v. Dorsey Machine Co.*, 95 Ind. 491 (493), and cases there cited; *Starret v. Burkhalter*, 86 Ind. 439 (444).

Taking the complaint as a whole, the charges of negligence therein may be summarized as follows:

Appellant, by its agents and servants, carelessly and negli-

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gently used a defective locomotive, not suitable or sufficient to draw a passenger train at a high rate of speed; and using that locomotive, it carelessly and negligently ran the train at the dangerous rate of fifty miles per hour, and was guilty of carelessness and negligence in running the train at that rate, with the defective locomotive, upon a down grade, without applying brakes, and around a curve not properly elevated, and over defective and insufficient rails not properly spiked to the cross-ties, over decayed, rotten, and defective cross-ties, and over a defective and insufficient road-bed, by reason of all of which acts of carelessness and negligence on the part of said defendant, so done and committed, and without any fault * * on the part of plaintiff, the train was thrown from the track, and she was injured. The complaint closed with the averments that in consequence of said careless and negligent acts of appellant, its agents and employees, the plaintiff, without her fault, was injured, etc.

The complaint is not as specific and methodical as it ought to be, but we think it sufficient to withstand the demurrer directed against it, especially when we apply to it the rules of construction prescribed by the statute, and established by our decisions.

It is alleged specifically, that the train was run over decayed and rotten ties, but the specific facts showing the insufficiency of the locomotive, in what regard the curve was not properly elevated, in what respect the rails were defective and not properly spiked to the ties, and in what respect the road-bed was otherwise out of repair, are not stated.

The general allegations as to these matters might have been reached by a motion to have the complaint made more specific, but the complaint is not necessarily bad, as against a demurrer, because the allegations are thus general. *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Jones v. White*, 90 Ind. 255; *Cleveland, etc., R. W. Co. v. Wyanant*, 100 Ind. 160; *Louisville, etc., R. W. Co. v. Kriming*, 87 Ind. 351 (352); *Boyce v. Fitzpatrick*, 80 Ind. 526.

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Whatever might be said of it, as an original proposition, under our later statutes, it is settled as a rule of pleading and practice in this State, in cases such as this, that it is sufficient to withstand a demurrer for want of facts, to characterize an act as having been negligently or carelessly done, and that under such an allegation, the facts constituting the negligence may be given in evidence. *Cleveland, etc., R. W. Co. v. Wynant, supra*; *Jones v. White, supra*; *Louisville, etc., R. W. Co. v. Krinning, supra*; *Boyce v. Fitzpatrick, supra*; *Cincinnati, etc., R. W. Co. v. Gaines*, 104 Ind. 526 (54 Am. R. 334); *Wabash, etc., R. W. Co. v. Johnson*, 96 Ind. 44.

As we have said, the complaint is not as specific and methodical as the rules of good pleading require, but looking to all the averments therein, and giving to them a fair construction, it may reasonably be said that negligence is charged with respect to the running of the train, the condition of the curve, ties, rails, etc.

To sustain the charge of negligence made in the complaint, it was competent for appellee to prove, if she could, that the curve was not properly constructed, that the rails were defective and not properly spiked to the cross-ties, and that the cross-ties were defective and rotten. The condition of the cross-ties, etc., as well as the speed of the train, are important elements in the negligence charged. *Pittsburgh, etc., R. W. Co. v. Jones*, 86 Ind. 496 (44 Am. R. 334); *Brinkman v. Bender*, 92 Ind. 234; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151 (155); *Louisville, etc., R. W. Co. v. Hanmann*, 87 Ind. 422.

When appellant admits by its demurrer all that is charged in the complaint, it admits too much, to be heard to say that it is not charged with actionable negligence.

The demurrer to the complaint was properly overruled.

It is contended by counsel for appellant, that the evidence does not show negligence on the part of appellant, and that, hence, the judgment should be reversed.

As the train upon which appellee was a passenger was

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passing around a curve upon a down grade, the spikes which held the outside rail to the ties gave way, the rail turned over, and the train left the track and went down an embankment, and appellee was injured.

She was without any fault that contributed to the injury which she received by the derailment of the train. These are facts which are established, and about which there is no conflict in the evidence.

Upon the authority of the case of *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264 (54 Am. R. 312), and the numerous cases there cited, it may be said here, as was, in substance, said there, that when the plaintiff made it to appear that she was a passenger upon appellant's train, and while being carried as such, the car in which she was seated left the track and she suffered injuries thereby, she had shown a state of things upon which a presumption of negligence arose against the railroad company, which stood with the force and efficiency of actual proof of the fact, and was available for her benefit until negatived and overthrown, and that such presumption can only be overthrown by proof that the casualty "resulted from inevitable or unavoidable accident, against which no human skill, prudence or foresight, as usually and practically applied to careful railroad management, could provide." In addition to the large number of cases there cited, we cite the following, decided by this court: *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228; *Sherlock v. Alling*, 44 Ind. 184; *Yerkes v. Sabin*, 97 Ind. 141 (145) (49 Am. R. 434).

Upon the evidence before us, we can not say that appellant met and overthrew the presumption which thus arose against it. Indeed, upon the record before us, this court can not say that the jury were not justified in regarding the other evidence as sustaining the presumption of negligence which arose upon the undisputed facts, rather than as meeting and overthrowing that presumption.

It is admitted by counsel for appellant, that the evidence, as a whole, shows that the train was running around the

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curve at the rate of between forty and forty-five miles per hour. Some of the witnesses testified that it was running at the rate of fifty-five miles per hour.

As to the condition of the ties, rails, curve and road, there is a conflict in the evidence. There is evidence that some of the ties, at the point where the wreck occurred, and under the displaced rail, were decayed and unsound; that the rails were old and somewhat worn; that the road-bed was not in a good condition, and that the outside rail, around the curve, was not sufficiently elevated to withstand the momentum of a rapidly moving train.

It was for the jury to determine as to what witnesses they would give the greater credence, and to settle the conflict in the testimony. What they have done in that regard, as settled by a long line of decisions, this court can not undo.

The verdict of the jury implies a finding that the rails were old and worn; that some of the ties were decayed and unsound; that the curve did not have a proper elevation, and that the train was running at the rate of fifty-five miles per hour, and that to run the train at the speed it was run around the curve and over the road in its then condition, was negligence.

Upon the record before us, this court can not disturb that determination.

The judgment in appellee's favor is \$4,000. If her present condition is attributable to the injuries received in the wreck of the train, the damages, clearly, are not excessive.

Appellant's counsel contend, however, that under the evidence, the damages are excessive, and base that contention upon the further contention that appellee's disabled and diseased condition is not the result of, and was not solely and proximately caused by, appellant's negligence.

In other words, they contend that at the time of and before the injuries received by the derailment of the train, appellee was, and had been, suffering from ovarian troubles, and

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that to that cause, and not to the injuries received through appellant's negligence, her present condition is attributable.

The testimony of the physician who had been her physician for some years before the casualty, and who attended her for some time thereafter, and that of other physicians who had made an examination of her person with a view of testifying upon the trial, go very far towards sustaining the contention of appellant's counsel.

But upon this question, again, there is a conflict in the evidence. There is evidence tending to show, that although since the accident, she has been, in a measure, a physical wreck, prior thereto she was a healthy and vigorous woman, and that her present condition is attributable alone to the injuries received through and by the wreck of appellant's train, upon which she was a passenger.

In all cases, where injuries have resulted to one from the wrongful or negligent acts of another, the courts should see to it that the party thus in fault shall respond in such an amount as will, as far as possible, compensate the injured party for all such injuries as may be properly attributed to such wrongful or negligent acts. And as clearly, courts and jurors should see to it that parties accused, and guilty, of negligence, shall not be compelled to respond in damages for injuries which are not properly attributable to such negligence.

Doubtless, cases occur where parties are not awarded such damages as they ought to have for the injuries received. And doubtless, too, there are cases where the damages awarded are largely excessive, and are awarded for sufferings and broken health which are the result of other causes, and not at all, in any proper and legal sense, the result of the negligence of the party against whom they are awarded.

As corporations often attempt to avoid liability, when in good conscience they ought to respond promptly, so there are often dishonest and unconscionable claimants who, having received some injury upon a wrecked train, or otherwise, feign

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injuries which they have not received, and seek a recovery against the corporation for these, and for broken health, which they know are the result of their own indiscretions, or other antecedent causes, and in no way attributable to the fault of the corporation.

And as there may be a refusal of compensation because of an honest belief on the part of the managers of the corporation, that there has been no fault for which it should respond in damages, so there may be, and doubtless are, many cases where persons having received some injury, and being fearful of consequences to follow, note with alarm the slightest symptoms, forget their real condition prior to the injury, and ignorantly and honestly attribute to that injury the recurring pains and failing health, which are the results wholly of antecedent causes, and in no way connected with the injury complained of, or chargeable to the negligence of the corporation.

These considerations require that juries shall exercise the greatest vigilance, and the broadest judgment, and move upon the elevated plain of justice, leaving at their feet, and out of sight, considerations for the wealthy and strong, on the one hand, and sympathy and prejudice on the other. They require the same on the part of the trial judge, and that, with his superior learning in the law, he shall have the courage to correct any errors into which the jury may fall, by setting aside their verdict, if necessary.

As has often been declared by this court, the jury and trial judge have the witnesses before them, and thus have a means of arriving at the truth, which an appellate court can not have. Until the contrary is affirmatively shown by the record, the appellate court must assume that the jury and court below exercised the utmost good faith, and brought to bear upon the issues involved their unbiased and best judgment.

Because of the conflict in the evidence, as to the cause of appellee's present condition, this court can not reverse the judgment upon the weight of the evidence upon that question.

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The next point discussed by appellant's counsel, is the alleged improper admission of certain testimony by the witness Palmer, as to statements made to him by the roadmaster, Rogers. Their argument is met by counsel for appellee with the contention that no grounds of objection to the testimony were stated to the court below, and that, hence, no question as to its admissibility is before the court for decision. That contention can not be avoided. The objection to the testimony, and the exception to the action of the court in admitting it, as stated in the record, were as follows:

"Objected to by the defendant, objection overruled, and exceptions taken at the time of objection."

The objection thus made, as many times decided by this court, was too general to present any question. *City of Delphi v. Lowery*, 74 Ind. 520; *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91; *Grubbs v. Morris*, 103 Ind. 166; *Shafer v. Ferguson*, 103 Ind. 90; *Indiana, etc., R. W. Co. v. Cook*, 102 Ind. 133; *McClellan v. Bond*, 92 Ind. 424; *Byard v. Harkrider*, ante, p. 376; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409.

Upon the trial below, after the witness Shanks had stated that he knew, and had a conversation at Mitchell with, John Carmony, the engineer in charge of the engine of the train upon which appellee was a passenger, and which was derailed near White river bridge on the same day, about seven miles from Mitchell, he was asked to "state what Carmony said in that conversation." The objection made to this question was as follows: "To which question the defendant by counsel objected, for the reason that such conversation was irrelevant and immaterial, was in no way connected with anything that occurred at the accident where plaintiff is alleged to have been afterwards injured near White river bridge." Over this objection and appellant's exception, the witness answered as follows:

"John Carmony told me that he would make the time if the wheels remained under him, or run her in the ditch."

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Here, again, appellee's contention can not be disregarded, that there is no available objection to the question, unless it be that the conversation was in no way connected with anything that occurred at the accident. In our judgment, no available question was saved by the objection, made in the manner and at the time it was made.

At the time the question was asked, it was not known to the court what the conversation between the witness and the engineer was, or what it was about. Until in some way enlightened, the court had no way of determining whether the "conversation was in no way connected with anything that occurred at the accident." Appellant's counsel so stated in their objection to the question, but that statement was simply their conclusion, put forward in the way of an objection to the question, and was not a statement of what the conversation was, or what it was about.

The court was thus in advance asked to rule out, as incompetent, testimony which as yet it did not know to be incompetent. And this court is now asked to overthrow a judgment, and hold that the court below committed an error in overruling the objection to the question, made at a time when it did not know to what subject the statements of the engineer might relate. Whether the answer by the witness is competent, is one thing; whether the question as propounded was competent, and whether or not the court shall be held to have erred in overruling the objection to the question at the time it did, and without knowledge of the subject to which the conversation related, are very different things. For aught that the court knew, the answer by the witness to the question might have been, that the engineer had stated that his engine and the cars were all new, and of a superior quality, and that his train was on time. An incompetent answer does not relate back, and render a question incompetent, which is otherwise competent. The question, it will be observed, is a general one, asking for what the engineer said in a conversation, and does not ask for what he said

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upon or in relation to any particular subject. If then, in that conversation, it was possible for the engineer to have said anything that would be competent and relevant to the questions at issue in this case, and that would have bound the company which he represented, it can not be said that the question was incompetent, and that the court erred in overruling the objection thereto. We think that it was possible for the engineer to have said something at Mitchell, although seven miles distant from the scene of the disaster, that would have bound the railroad company, and that would have been competent and relevant in this case.

It is charged in the complaint, as we have seen, that the railroad company was guilty of negligence in using a defective and insufficient locomotive, and that, using that locomotive, the train was negligently run at the dangerous rate of fifty miles an hour, upon a down grade, and around a curve, etc.

Suppose the engineer had said to the witness, that his engine was old, defective, and insufficient; that the flanges on the wheels were too small in the beginning, and had become smaller by wear and breakage, and that by reason of such defects, the engine had, prior thereto, left the track; can it be doubted that such declarations would have been competent evidence in this case?

Knowledge of such facts by the engineer in charge of the engine, would clearly have been knowledge to the railroad company, whose servant and agent he was, and evidence of such knowledge would have been the most potent evidence in support of the negligence charged in the complaint.

The court, of course, might have required appellee's counsel to state what was expected to be proved by the answer of the witness to the question, but it was not bound to do so. We think, too, that appellant might have required the question to be made more specific, so as to show to what subject the statement by the engineer related. No such request was made, nor was there any objection to the question because of its being so general; and, clearly, the question being compe-

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tent in the absence of such objection, appellant might have moved to strike out the answer, and saved the point as to its competency, by excepting to the ruling of the court if adverse to it.

Having neglected to pursue either of these methods, it ought not to be heard now to insist upon a reversal of the judgment because of the court's ruling upon the objection, made in the manner and at the time it was made. *Wolfe v. Pugh*, 101 Ind. 293 (306).

The question here is, did the court, in overruling the objection to the question, under the circumstances, commit an error?

We think not. When we have decided this, we have decided all that the record requires, and hence do not enter upon the question as to the competency of the answer by the witness.

Further contentions by appellant's counsel are, that the court below erred in allowing appellee's witness Sheeks, who saw the train about a mile and a half south of where the accident occurred, to testify that at the point where he observed it, "the train was running at a rapid rate of speed, faster than usual," and in overruling an objection to the following question, put by appellee's counsel to her witness Wilkinson, viz.: "What was the speed of that train, going north on the 13th day of June, 1882, as compared with the usual speed of trains going in the same direction at that point?"

To this question the witness answered: "The train, when it passed my house, was running very fast, and faster than trains of defendant had usually run at that point."

The only specific objection made to the questions put to these witnesses, and hence the only objection that can be noticed, was, that the evidence thus sought would not tend to show the speed of the train, at or near the place where the accident took place, and that it had not been shown that the witnesses were competent to form an opinion.

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As will be observed, the objection does not raise the question as to whether or not a witness may give the result of his comparison of the speed of one train, with the speed of another, and, hence, that question is not before us for decision. The only question raised by the objection is this: In this case, where negligence is charged in the running of the train at a high and dangerous rate of speed, may witnesses, who saw the train at a point one and a half miles from the place where the accident occurred, state the rate of speed at the point where they thus observed the train?

In point of time, at least, the train, running at a high rate of speed, would not be far from the place of the accident, when a mile and a half away.

Whatever might be said of the evidence, if it stood alone, and unconnected with other evidence, we think it was competent in connection with the testimony of the witness, Matthews. He showed himself to be competent to give an opinion as to the speed of trains when upon them, and testified that he was on the train in question, had his attention directed to its speed by other passengers talking about it just before the accident; that it was running at the rate of fifty-five miles an hour, and that the speed had not been checked after leaving Mitchell.

If, as this witness stated, the speed had not been checked, it was not improper to show that it was running at a rapid rate of speed when but a mile and a half from the place of the accident. As to the competency of the witnesses, it is sufficient to say that they were certainly competent to know and state whether the train was moving rapidly or slowly.

It has been held, that no question of science is involved, and that a person need not be an expert to give his opinion as to the speed of a moving train.

The testimony of one not an expert may not be of so much weight, but it is nevertheless competent. *Detroit, etc., R. R. Co. v. Van Steinburg*, 17 Mich. 99.

It is argued in behalf of appellant, that by the first in-

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struction, the court submitted the case to the jury upon a false theory. In that instruction, the court embodied, substantially, the averments in the complaint. The instruction is no broader than the complaint, and in no way, that we can conceive of, could it have misled the jury.

It is earnestly insisted that the fourth charge given by the court was erroneous, in that the jury were therein instructed, that in order to meet the presumption of negligence, which arose out of the fact of the wrecking of the train, it was incumbent upon appellant to explain the cause of the accident. So much of that instruction as needs to be set out is as follows:

“The plaintiff must allege that the accident was caused by the negligence or carelessness of some agent or employee of the defendant, and the plaintiff must establish this averment, but when the plaintiff proves that the train was precipitated down an embankment, and the plaintiff, without fault on her part, thereby received injuries, the presumption arises that the accident was the result of some act or omission of the defendant’s agents, servants and employees, and it devolves upon the defendant to explain how such accident happened. And if, after the jury has heard all the evidence, it finds that the accident occurred without any fault, carelessness or negligence of the defendant, its agents, employees or servants, but that the same occurred by reason of some act, or the conduct of some one for whose act or conduct the defendant is not responsible, and which the defendant could not guard against by reasonable diligence, then the defendant would not be liable.”

The instruction must be considered as a whole, and in connection with the other instructions in the case. If taken as a whole, and in connection with the other instructions given, the law of the case is correctly stated, there can be no available error in the fact that there may be some inaccurate statements in the instructions above set out. *McDermott v. State*, 89 Ind. 187; *Nicoles v. Calvert*, 96 Ind. 316; *Wright v.*

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Fansler, 90 Ind. 492; *Story v. State*, 99 Ind. 413; *Barnett v. State*, 100 Ind. 171; *Koerner v. State*, 98 Ind. 7; *Elkhart Mut. Aid, etc., Ass'n v. Houghton*, 103 Ind. 286 (290); *Stockwell v. Brant*, 97 Ind. 474; *Louisville, etc., R. R. Co. v. Kelly*, 92 Ind. 371; *Young v. Clegg*, 93 Ind. 371; *Louisville, etc., R. W. Co. v. White*, 94 Ind. 257; *Louisville, etc., R. W. Co. v. Grantham*, 104 Ind. 353; *Conrad v. Kinzie*, 105 Ind. 281.

There is a statement in the instruction, that to meet the presumption of negligence on its part, it devolved upon appellant to explain how the accident happened. If standing alone, as in the case of *Tuttle v. Chicago, etc., R. R. Co.*, 48 Iowa, 236, cited by counsel, that statement would be erroneous.

Doubtless, there have been, and will hereafter be accidents, the causes of which can never be known.

What is required, and all that is required, of a railroad company in a case like this, to overthrow the presumption of negligence on its part, when such a presumption arises, and to exonerate itself from liability, is to show, as stated in the case of *Cleveland, etc., R. R. Co. v. Newell, supra*, "that in the conduct of its business it had employed the utmost skill, prudence and circumspection practically and usually applied to railroad carrying, and that, notwithstanding all that, the cause of the accident was not and could not reasonably have been discovered and guarded against."

The statement in the instruction complained of must, as we have seen, be taken in connection with what precedes and follows it.

In the former part of the charge, not here set out, the court instructed the jury, that if certain facts were found, a presumption of negligence would arise, and that it would then devolve upon appellant to show that the accident happened without any fault or negligence on its part. Thus, the jury were instructed, that an absence of negligence on the part of appellant would be a sufficient defence; and so, immediately following the statement complained of, the jury are

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again instructed that appellant would not be liable, if the accident should be found to have occurred without fault or negligence on its part.

By the second charge, the jury were instructed that appellant would be liable, if the accident happened by reason of its negligence.

By the third instruction, the jury were told that they would be required to determine whether the accident occurred through the "negligence and carelessness of the defendant, its agents, servants and employees."

The sixth instruction was upon the same subject, and was as follows:

"It is for you to determine from the evidence, whether the accident occurred through the fault of the defendant, or that it would have been avoided by proper and reasonable care and diligence of defendant's agents and employees."

By those instructions, taken together, the case was submitted to the jury, upon the theory that appellant was not liable unless guilty of negligence; so, doubtless, the jury understood the instructions. It is hardly possible that they could have understood from them that appellant was to be held liable unless it furnished an explanation of how the accident occurred.

What has been said of the fourth may be applied, to a large extent, to the fifth instruction. Taken as a whole, and in connection with the other instructions, the jury were thereby instructed that appellant was liable, if it was negligent with respect to the condition of the ties, etc., or the running of the train. That, we think, brought the case within the complaint, and, hence, was not erroneous.

After stating the elements of damages to be considered by the jury, including permanent disablement, if that should be found, the court added this, in the seventh instruction: "To which you may add such an amount, as you may, in the exercise of a sound discretion, think will be a just compensation for her anxiety and distress of mind," etc.

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The only objection urged to that instruction is, that the jury were thereby authorized to fix the amount of damages for appellee's anxiety and distress of mind, without regard to the evidence.

The eleventh instruction fully meets that objection. In that instruction, the jury were not only directed to determine the case by the law and the evidence, but were cautioned in strong terms against being influenced, in the least, by sympathy, favoritism or prejudice.

It is unnecessary, as it is impracticable, to embody all the law of the case in one instruction, and when a rule of law applicable to the case is given in one instruction, it is not necessary to repeat it in another. *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409 (426); *City of Indianapolis v. Scott*, 72 Ind. 196.

The ninth instruction, of which counsel for appellant especially complain, is as follows:

"9. If you find from the evidence, that the plaintiff was diseased at and before the accident, and that her present condition is attributable to such former diseased condition, and not in any manner or part attributable to the injuries received in the railroad accident, and that plaintiff in fact received no injuries from said accident, then you would have to find for the defendant. If you find that plaintiff was diseased at and before the accident, but that by the accident her disease has been aggravated or intensified, then you will give her damages for just such injuries as she has sustained, which are the result of the accident. If you find from the evidence, that plaintiff, prior to the accident, was sound and free from disease, and that by reason of the injury received in the accident, she has become crippled, diseased, disabled and permanently injured, then you will assess such a sum as will compensate her fairly for the injuries thus sustained."

The first objection urged to this instruction is, that it assumes that appellee was injured. In answer to that, it is sufficient to say, that other instructions left it to the jury to

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determine as to whether or not appellee had been injured, and that the evidence, without any conflict, shows that she was injured. See *Koerner v. State*, 98 Ind. 7 (13).

The only other objection that challenges attention, is limited to that portion of the instructions with reference to the aggravation of an existing disease.

It is most earnestly contended by appellant's counsel, in a lengthy argument, which shows thought and research, that appellant can not be held liable for the aggravation of an existing disease, although that aggravation was the result of its negligence, and the injury appellee thereby received. In other words, their position is, that if at the time of the injury appellee was in any way suffering from, and was to any extent disabled by, an existing disease, and her sufferings were intensified, and her disablement increased, by the injury, she can not recover for such additional suffering and increased disablement, because the injury was not the proximate and sole cause thereof. The argument is based upon the familiar maxim, *Causa proxima, non remota, spectatur*.

We do not think it would be profitable, in this case, to extend the opinion in a review of the numerous cases cited by counsel, and in an examination of the arguments advanced, as the question here involved has been examined at length, and decided by this court in recent cases, one of which has been decided since the filing of appellant's brief. Under those decisions, the law is correctly stated in the instructions under consideration. *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346 (49 Am. R. 168), and the numerous cases there cited; *Louisville, etc., R. W. Co. v. Falvey, supra*, and the cases there cited.

By an instruction asked by appellant, the court was requested to charge the jury, that a railway company has the right to propel its train over its road at such rate of speed as it sees fit; that no rate of speed is negligence *per se*, or of itself, and that if, in this case, the jury should find that, at the place where the accident occurred, the railroad track was

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in good repair, the ties sound, the rails of suitable character, and in safe condition, properly spiked and fastened to the ties with proper elevation, the running of the train at a high rate of speed would not be an act of negligence, and the verdict should be for appellant. As applied to this case, that instruction, as asked, does not state the law correctly.

Whatever may be said in other cases, it surely can not be, that as between the railroad company and the passengers upon its trains, whose lives are in its keeping, it may run the trains at any rate of speed it may see fit, upon a down grade, and around a curve. The rate of speed might be such as to make derailment of the train, under such circumstances, almost certain. However that may be, in this case, it was for the jury to say whether or not, under all the circumstances, the appellant was guilty of negligence in running the train at the rate of speed it was run.

The cases of *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168, and *Cleveland, etc., R. W. Co. v. Newell*, 75 Ind. 542, cited by appellant's counsel, lend no support whatever to the instruction. The reasoning there condemns it. Neither do the other cases cited support the instruction. With the exception of the case of *Indianapolis, etc., R. W. Co. v. Hall*, 106 Ill. 371, in which a contrary doctrine was held, none of them were cases between the corporation and a passenger. In that case, the locomotive and cars were in good condition, and the track was straight and in good repair.

In the court below, the jury were instructed that if the train was run at such a rate of speed as to become a negligent management, and the injury resulted in consequence, the verdict should be for the plaintiff.

The Supreme Court held that the instruction was a proper one, and said: "So long as the increased speed of trains adds nothing to the dangers and risks of the travelling public, courts have no right to interpose. Subject to this limitation, railway companies have the unquestioned right to fix the rate of speed as they think best."

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After a patient and careful examination of the alleged errors discussed by counsel, we find nothing in the record that requires, or that would justify this court in reversing the judgment.

Judgment affirmed, with costs.

Filed Dec. 14, 1886; petition for a rehearing overruled Feb. 24, 1887.

No. 12,846.

POCOCK ET AL. v. REDINGER.

WILL.—Description of Land.—Mistake.—A will contained this provision: "As to my real estate, I dispose of it as follows: I own the east half of the northwest quarter," etc., "and I hereby give and bequeath the same to my son," etc. The testator did not own the east half of the northwest quarter, but did own the west half.

Held, that as the will itself shows a mistake, it will be made to operate upon the land intended to be devised.

SAME.—Evidence.—Declarations of Testator.—Verbal declarations of a testator are not competent evidence to show a mistake in a will, but facts and circumstances are.

From the Marshall Circuit Court.

A. C. Capron and *A. Johnson*, for appellants.

M. A. O. Packard, *O. M. Packard* and *C. P. Drummond*, for appellee.

ELLIOTT, C. J.—The will of Catherine E. Redinger contains; among others, this provision: "As to my real estate, I dispose of it as follows: I own the east half of the northwest quarter of section thirty-four, township thirty-two north, of range three east, in Marshall county, Indiana, and I hereby give and bequeath the same to my son, Charles A. Redinger, as and for his own absolute property forever. I also own the east forty-six acres off of the south sixty-three acres of the south half of the southwest quarter of section twenty-eight,

106	573
122	182
108	573
140	408

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township thirty-two north, of range three east, Marshall county, Indiana, which, should the same remain undisposed of at my decease, I desire my executor to appraise and sell."

The testatrix did not own the east half of the quarter section described in the will, but she did own the west half of that quarter section. The facts given in evidence show very clearly that she intended to devise to the appellee the quarter section owned by her, and that she made a mistake in specifically describing it.

The question in the case, as stated by counsel, is, Whether it was competent to show by extrinsic evidence that a mistake was made in describing the land devised?

The general rule undoubtedly is, as the appellants contend, that a mistake in a will can not be shown by parol evidence. *Judy v. Gilbert*, 77 Ind. 96, and cases cited; *McAlister v. Butterfield*, 31 Ind. 25; *Funk v. Davis*, 103 Ind. 281. But we do not regard this case as within the rule, for, in our opinion, the mistake is shown by the words of the will when applied to the subject-matter upon which, as its language discloses, it was intended to operate. The words of the will show that the provision under consideration was intended to devise the land owned by the testatrix, for she introduces the subject by the words, "As to my real estate," and then says: "I own the east half of the northwest quarter of section thirty-four," and "I devise the same" to Charles A. Redinger, thus clearly showing that she meant to devise the land she owned. The words used in disposing of the second of the two parcels which she devised add strength to our conclusion, for the testatrix says: "I also own the east forty-six acres off of the south sixty-three acres of the south half of the southwest quarter of section twenty-eight." The mistake appears, from the language of the will, without the aid of verbal declarations, for, when it was shown that the testatrix did not own the east half of the quarter section, but did own the west half, no parol evidence was necessary to prove that she had made a mistake in drafting her will.

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The case is within the rule declared in *Cleveland v. Spilman*, 25 Ind. 95, and *Black v. Richards*, 95 Ind. 184. The principle upon which the rule depends is, that where the will itself shows that there has been a mistake in specifically describing land which is also designated by a general description, the will may be made to operate upon the land intended to be specifically described, but which, by mistake, is incorrectly described in the specific description which follows the general. Where, however, the language of the will itself does not furnish evidence of a mistake, a court can not interfere upon the ground that a mistake was made by the testator.

Verbal declarations of a testator are not competent evidence to prove a mistake in a will, but evidence of facts and circumstances is. It is proper to show the situation and condition of the testator's property, but it is not proper to prove what he said, for when the instrument is written, that is deemed the expression of the testator's intention, and there the exploration for his intention must be made. It is obvious that if verbal declarations were admitted, wills might be overthrown which expressed the intention of one who could not dispute evidence of his declarations, nor give any explanation of them, and thus grave evils would result. The law, however, is so well settled by the authorities that discussion is unnecessary. *Funk v. Davis, supra*; *Judy v. Gilbert, supra*.

The trial court did, therefore, err in admitting evidence of the oral declarations of the testatrix; but we think this error must be treated as a harmless one, as it clearly appears from the record that the result must have been the same had this evidence not been given.

We do not depart from the ruling in *Judy v. Gilbert, supra*, and *Funk v. Davis, supra*, for we hold that the will decisively and clearly shows that the testatrix meant to devise the half of the quarter section she owned, and not any other parcel; that, as it may be shown by evidence of the fact,

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without proof of oral declarations, that she owned, not the parcel specifically described, but another in the same section, the case is not within the rule declared in those cases, but is within the rule declared in *Cleveland v. Spilman*, *supra*.

Judgment affirmed.

Filed Dec. 21, 1886.

 No. 12,743.

THOMAS v. THOMAS ET AL.

WILL.—*Devise of Life-Estate.*—*Intestacy as to Fee.*—Where a testator devises his lands to his widow for life, but fails to dispose of the fee, the law casts it upon his heirs.

SAME.—*Descent.*—*Exclusion of Heir.*—*Estoppel.*—A subsequent clause of the will, bequeathing to a named son "twenty-five dollars only" of all the testator's real and personal property, is not of itself sufficient to exclude him from participation under the statute of descents, nor is he estopped to assert his right as heir by receiving the legacy.

From the Washington Circuit Court.

W. K. Marshall, F. L. Prow, S. H. Mitchell and *R. B. Mitchell*, for appellant.

S. B. Voyles and *H. Morris*, for appellees.

MITCHELL, J.—Ambrose E. Thomas, in a formal complaint for partition, wherein the appellees were named as defendants, alleged that he was the owner in fee, as tenant in common, of an undivided one-eighth of certain real estate described, which he prayed might be partitioned according to the interests of the several tenants, as such interests were specifically alleged.

The appellees answered that the land described had been owned in fee by Andrew Thomas, deceased, who departed this life testate, in the year 1878, leaving as his heirs a widow and eight children. The appellant and the appellees were

108	576
128	581
108	576
129	87
108	576
136	36
108	576
147	393
108	576
171	338

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children of the testator. In the last will of Andrew Thomas, which is made part of the answer, appears the following :

"*First.* I give and bequeath to my beloved wife, Lucinda K. Thomas, in lieu of her interest in my lands, all of my lands" (describing them), "embracing in all two hundred and fifty-one acres, more or less, which I consider to constitute my home place upon which I now live, to hold during her natural life. I also give to my wife one-third of all the personal property that I may own at the time of my decease, and also in addition three hundred dollars in money.

"*Second.* It is my will that all the rest of my personal property be sold and the proceeds divided among my lawful heirs equally, except my son, Ambrose E. Thomas, to him I will twenty-five dollars only of my real and personal property, in addition to the amount I have already advanced him."

Apart from the foregoing, the will contained nothing in the nature of a disposition of the testator's property.

The answer set up that the testament had been duly admitted to probate, that the widow had elected to take the provisions therein made for her, and that the plaintiff had received and receipted for the bequest of twenty-five dollars, which fact had been duly reported in the account of the executor, who had fully settled the estate according to the provisions of the will, and who, it was alleged, had been discharged.

A demurrer was overruled to this answer, and the plaintiff electing to stand by the demurrer, judgment was given that he take nothing by his suit. The propriety of this ruling depends upon the construction of the provisions of the will above set out.

As will be seen, the only disposition which the testator made of or concerning his real estate, was to devise an estate for life in the land in controversy to his widow.

In respect to the remainder in fee, he died intestate. In so far as the real estate was not disposed of by the will of

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the testator, the law cast it upon his heirs, at his death. *Hauk v. McComas*, 98 Ind. 460; *Waugh v. Riley*, 68 Ind. 482.

The mere fact that a will was made did not interrupt the statute regulating descents, unless by force of the testament a disposition was made of the whole estate different from that provided by law, in case of intestacy. *Armstrong v. Berreman*, 13 Ind. 422; *Rusing v. Rusing*, 25 Ind. 63; *Lindsay v. Lindsay*, 47 Ind. 283; *Dale v. Bartley*, 58 Ind. 101; *Parks v. Kimes*, 100 Ind. 148.

Conceding to some extent at least the force and application of the rule stated, counsel argue in support of the ruling below, that the second clause of the will manifests an intention of the testator to dispose of the remainder of the real estate to his heirs, excluding the appellant Ambrose.

Whatever may have been his intention in regard to the exclusion of his son Ambrose E., the fact remains, that there is not one word in the will looking to a disposition of the reversion, after carving out of it a life-estate for his widow.

The controlling fact is, not the emphasis with which he may have declared his purpose to exclude the appellant, but that he wholly failed to devise the estate so as to vest the remainder in fee in any one, thus leaving it to be controlled by the canons of descent.

The case is in no way distinguishable in principle from *McIntire v. Cross*, 3 Ind. 444.

We agree that the intention of the testator is to be ascertained and carried into effect, in the construction of every will, but this intention is to be collected from what is contained in the instrument. The rule is not to be carried to the extent of importing bodily into the testament a disposition of an estate, concerning which the instrument itself is entirely silent.

It is insisted that because the appellant received the legacy bequeathed to him in the second clause of the will, he thereby became estopped to assert his right as heir.

The principle invoked is not applicable here. A benefi-

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ciary in a will or other instrument will not be heard to repudiate the instrument after accepting the benefits which it confers. Here, however, the appellant makes no assault upon the will. The appellees set up the will to bar the appellant's right as heir. Accepting the will according to its terms, the appellant asserts that his right in the real estate as heir is in no manner affected by the will. In this he is sustained by the instrument which the appellees have produced.

What the appellant's rights may be in the end, in view of the advancements referred to in the will, is not now before us.

The court erred in overruling the demurrer to the answer. Judgment reversed, with costs.

Filed Dec. 18, 1886.

108	579
128	64
108	579
155	284
156	58

No. 12,122.

DUNCAN, ADMINISTRATOR, v. GAINNEY ET AL.

DECEDENTS' ESTATES.—Appeal.—Application to Supreme Court for Leave.—

Notice.—Practice.—Res Judicata.—Where an appeal from a decision affecting a decedent's estate is not taken within the time limited by section 2455, R. S. 1881, and afterwards an application is made to the Supreme Court for leave to appeal, the adverse party, when practicable, is entitled to notice of such application; but where leave is granted without such notice, and both parties are brought into court, the matter will be treated as adjudicated, and a subsequent motion to dismiss will be overruled.

SAME.—Will.—Charging Land Devised With Payment of Debts.—Other Property not Released.—A provision in a will, charging the land devised to the testator's widow with the payment of all claims against his estate, does not release property left to other devisees from sale in the event that devised to the widow shall be insufficient to pay the debts.

SAME.—Unauthorized Sale of Land by Administrator.—Re-Sale.—An administrator has no authority, in the absence of a testamentary provision to that effect, to sell real estate of his decedent, except upon the order of the proper court, and where a sale is made without such authority, the purchase-money does not become assets in the hands of the administrator, and the purchaser takes the land subject to its liability to be again sold under legal proceedings for the payment of debts.

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SAME.—Rights of Purchaser.—Subrogation.—But where, in such case, the purchase-money derived from such unauthorized sale, is by special arrangement applied on debts of the estate, the purchaser becomes the equitable owner of such debts and is entitled to be subrogated to all the rights of the original holders, according to their respective priorities, but his lien is of no greater extent.

From the Lawrence Circuit Court.

G. W. Friedley and E. D. Pearson, for appellant.

M. F. Dunn, G. G. Dunn and N. Crooke, for appellees.

NIBLACK, J.—The complaint in this case averred that one John P. Gainey was in his lifetime the owner, amongst other things, of two forty acre tracts of land in Lawrence county, and of a one hundred and sixty acre tract of land in the county of Daviess; that, on the 24th day of July, 1871, the said Gainey executed and published his last will and testament, by which he devised and bequeathed his Lawrence county lands, and some personal property, to his daughter, Elizabeth Gray, and likewise devised and bequeathed the Daviess county lands and nearly all of his remaining personal property to his wife, Louisa J. Gainey, charging the property so devised and bequeathed to his wife with the payment of his debts, funeral expenses and all other claims against his estate; that Gainey, the testator, died on the 8th day of September, 1871, leaving his said will, containing some bequests to other persons, in full force, the same being soon thereafter admitted to probate; that the personal estate of the decedent was insufficient to pay his debts and the charges against his estate; that letters of administration, with the will annexed, were first issued to Edmond B. Gainey who was afterwards removed; that Oliver P. Anderson succeeded the said Edmond B. Gainey in the administration of said estate, but that he had, after a time, resigned without finally settling the estate; that letters of administration upon the estate remaining unadministered, and with the will annexed, had been issued to the petitioner and plaintiff, Coleman Dun-

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can. The prayer of the complaint was, that the Daviess county lands should be ordered and decreed to be sold for the payment of the remaining debts and unpaid charges against the decedent's estate.

The widow and other devisees and legatees under the will were made defendants, as were Matthew Woods, John Woods and Abraham K. Cunningham, who were alleged to have acquired some interest in the lands in controversy. These last named defendants answered in an elaborate series of paragraphs, to some of which demurrers were sustained, and issues were formed upon those held to be sufficient. The widow and the other devisees and legatees made no defence.

The circuit court made a special finding of the facts adjudged to have been proven at the trial: *First.* That the said John P. Gainey died testate at the time named in the complaint. *Second.* That certain property, including the real estate in question, had been devised and bequeathed by him to his widow, Louisa J. Gainey, as alleged, subject to an express direction that his debts, funeral expenses and other charges against his estate should "be paid out of the property" therein devised to his wife. *Third.* That the decedent left the said Louisa J. Gainey and others, naming them, as his only heirs at law, devisees and legatees; that Edmond B. Gainey was first appointed administrator with the will annexed, and that while acting as such he paid a part of the indebtedness against the decedent's estate; that he was succeeded as such administrator by Oliver P. Anderson, who sued him and his sureties on his bond and obtained a judgment for an alleged waste of the assets of the estate; that afterwards Anderson resigned, and the plaintiff, Coleman Duncan, was appointed his successor; that the plaintiff had collected the judgment recovered as above by Anderson, and had paid out the proceeds on debts against the estate; that there remained no personal property or assets of a personal character belonging to the estate; that the debts and charges against the estate still remaining unpaid amounted to

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the aggregate sum of \$1,273.65; that while the said Edmond B. Gainey was acting as the administrator of the estate, that is to say, in April, 1872, he, without any order of court, sold the Daviess county lands to the defendant Matthew Woods, for the sum of \$1,400, and caused the same to be conveyed to him by a warranty deed, executed by the said Louisa J. Gainey as the devisee and supposed owner thereof; that the said Matthew Woods subsequently conveyed one-half of said lands to the defendant Abraham K. Cunningham; that the entire sum of \$1,400, paid by the said Matthew Woods for the lands so purchased by him, had been paid out upon, and applied in payment of, debts against the estate of the decedent; that \$950 of said amount was, under the direction of the administrator, paid out personally by Matthew Woods on such claims, specifying the particular claims so paid by him; that the said Matthew Woods had made improvements on that part of the lands still retained by him, of the value of \$500; that such part of said land had been in his possession for twelve years, and was of the rental value of \$30 per year; that the said Cunningham had made improvements on that part of the lands purchased by him of the value of \$400; that he had been in possession for twelve years, and that the rental value of his part of such lands was \$30 per year.

Upon this finding of the facts, the circuit court came to the conclusion that the real estate, so in the possession of the said Woods and Cunningham respectively, was liable to be sold, and ought to be sold, for the payment of the debts and charges still outstanding against the estate of John P. Gainey, the decedent, but that said real estate was subject to a prior lien in favor of the said Woods and Cunningham for the sum of \$1,450, which ought to be first paid out of the proceeds of such real estate when the same should be sold.

Over exceptions to the conclusions of law thus stated, the real estate referred to was ordered to be sold by the plaintiff and the proceeds applied in accordance with the conclusions of law as stated.

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This appeal was not taken within the time limited by section 2455, R. S. 1881, having reference to appeals from decisions affecting decedents' estates, but was taken under leave afterwards granted by this court upon the *ex parte* application of Duncan, the plaintiff below. Since the appeal was perfected under the leave thus granted, the appellees have moved to dismiss the appeal, upon the ground that they were not notified of the appellant's application for leave to take it, and hence that they had no opportunity of resisting such application, as they probably might have done successfully, citing the case of *Browning v. McCracken*, 97 Ind. 279, as holding that they were entitled to such notice.

Doubtless the better practice is to require notice of such application when it is practicable to do so, but as both parties have, by reason of this appeal, been brought into court, we feel constrained to treat the order granting the authority to appeal as an adjudicated matter, and, in consequence, to overrule the motion to dismiss the appeal. We nevertheless regard the rule of practice suggested by the case of *Browning v. McCracken*, *supra*, as being the correct general rule.

As has been made to appear, the real estate involved in this cause was not, in any manner, devised to the executor. Nor was any authority conferred on the executor over such real estate greater than that which the law devolved upon him as the personal representative of the decedent in the administration of his estate.

The provision of the will, requiring the payment of the debts, funeral expenses and other charges against the decedent's estate to be made "out of the property" devised to the widow, was a mere marshalling of the assets of the estate as between the widow and the other devisees and legatees under the will, and did not create any specific lien against the widow's share for the payment of any particular debt, or class of debts. Nor did it release the property left to the other devisees and legatees from ultimate sale for the payment of debts and charges against the estate, in the event that

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the property devised to the widow should prove to be insufficient for their payment.

The law does not, and did not at the time of the death of John P. Gainey, confer upon an executor or administrator any authority to sell and convey the real estate of his decedent, except by order of the proper court, in the absence of a testamentary provision authorizing him to so sell and convey such real estate. *Edwards v. Haverstick*, 47 Ind. 138; *Hankins v. Kimball*, 57 Ind. 42; *Kidwell v. Kidwell*, 84 Ind. 224.

Even when real estate is specifically devised to be sold for the payment of debts, it is necessary to obtain an order of court for its sale unless by the terms of the will a different course of proceeding is prescribed. 2 R. S. 1876, pp. 529, 530, sections 92, 93, 94; R. S. 1881, sections 2332, 2359, 2360, 2361.

Consequently, the sale of the real estate, made to Matthew Woods in this case, was not a sale in accordance with any authority conferred either by the decedent's will, or any law of this State, and hence did not discharge the real estate from liability to be again sold, under proper legal proceedings, for the payment of the debts for which it was, from the first, liable to be sold, both under the will and under the law.

Woods, under the conveyance to him, simply assumed the same relations to the land which the widow had previously occupied, that is, he became its owner subject to its liability to be sold under appropriate legal proceedings for the payment of the debts and other charges against the estate. The purchase-money paid by Woods did not become assets in the hands of the administrator. *Hankins v. Kimball*, *supra*.

The amount paid by him was only applied on debts against the estate under a special arrangement with the widow and the administrator. This made him the equitable owner of the debts thus paid by his money and property, and entitled him to be subrogated to all the rights of the original holders of such debts according to their respective priorities, in the

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same manner, and to the same extent, that the administrator would have been, if he had advanced and used his own money in the payment of the debts in question. Sheldon Subrogation, section 202. But we know of no principle upon which Woods, or his assignee in part, Cunningham, can be held to have acquired a prior lien for the payment of the debts to which they are so entitled to be subrogated, over other debts of the estate of the same class. The inevitable inference is that the circuit court erred in its conclusion of law that Woods and Cunningham had acquired such a prior lien.

The judgment is reversed, at the costs of Matthew Woods and the appellee Cunningham, and the cause is remanded to the court below, with instructions to restate its conclusions of law in accordance with this opinion, and to render judgment accordingly.

Filed Dec. 21, 1886.

108	585
124	356
126	377
108	585
137	220

No. 13,262.

WELLS v. BENTON ET AL.

CONVEYANCE.—Mistake.—Equitable Title.—Judgment.—Sheriff's Sale.—Husband and Wife.—Where a purchaser pays full consideration for, and goes into possession of, a tract of two hundred acres of land, but by mistake the deed to him describes sixty acres only, a subsequent conveyance to his wife, at his request, upon discovering the mistake, of the remaining one hundred and forty acres, vests in her, and a conveyance from her will vest in her grantee, a complete title, free from intervening judgments recovered against the grantor, and all claims of title thereunder, as such judgments could not become effectual liens as against the actual owner of the land.

SAME.—Agreement of Grantee to Pay Judgments which are Not Liens.—Consideration.—Covenant Running with Land.—A stipulation in the deed to the wife that, as a consideration for the conveyance, she is to pay certain judgments recovered against the grantor after the sale to her husband, is without consideration, and does not have the effect to enlarge or extend

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the lien of the judgments, nor is it a covenant running with the land which can bind it in the hands of her grantee.

JUDGMENT.—*Lien Can Not be Created by Agreement.*—*Prior Equities.*—A judgment is purely a statutory lien. It can not be made a lien, so as to be enforced by execution, by the mere agreement of the parties, nor can it prevail as against prior equities.

DEED.—*Covenant Running with Land.*—A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.

From the Jackson Circuit Court.

W. K. Marshall and F. Brannaman, for appellant.

R. Applewhite, B. H. Burrell and J. F. Applewhite, for appellees.

ZOLLARS, J.—Appellant, in his complaint, and appellee Benton, in his cross complaint, each sought a quieting of his title against the other, in and to the one hundred and forty acres of land in dispute.

The court below made a special finding of the facts, and upon them pronounced its conclusions of law, and rendered a decree quieting the title to the land in appellee, upon his cross complaint.

It appears from the facts so found, that on the 27th day of August, 1865, one Wright owned two hundred acres of land, and by a warranty deed, executed on that day, conveyed it to Charles W. Conner, and put him in possession. On the 23d day of October, 1865, Conner sold the land to one Alexander M. Thompson, received from him full payment therefor, and executed to him a warranty deed, by which he intended to convey to him the whole of the two hundred acres of land, but by the error and mistake of the parties, and the scrivener, the description written in the deed described but sixty acres, there being no description that covered the remaining one hundred and forty acres of the two hundred acres intended to be conveyed. Thompson, ignorant of the mistake, accepted the deed and went into possession of the

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whole two hundred acres of land, and held possession of it until 1873.

On the 25th day of October, 1871, D. J. Harrall recovered a judgment in the common pleas court against Thompson. On the 2d day of November, 1871, an execution was issued upon the judgment and levied upon the whole two hundred acres of land as the property of Thompson. The execution was returned on the 29th day of April, 1872, with an endorsement that the property had not been sold for want of time. On the 10th day of May, 1872, a *venditioni exponas* was issued, and the whole of the two hundred acres was sold by the sheriff, on the 8th day of June, 1872, as the property of Thompson, and was purchased by James C. Wells. He paid the purchase-money, and received a sheriff's certificate of purchase. In June, 1873, Wells entered into the undisputed possession of the whole of the two hundred acres, and held that possession until 1879, when he assigned his certificate of purchase to Samuel T. Wells, plaintiff below, and appellant here. On the 27th day of February, 1879, appellant received a sheriff's deed for, and went into the possession of, the whole two hundred acres, sold as aforesaid, and continued in that possession until the trial of this case below.

The mistake in the description of the land in the deed from Conner to Thompson was not discovered until some time in the year 1877. In February, 1879, after proper requests from appellant, Conner refused to sign or execute any deed in the way of correcting the mistake in his deed to Thompson. On the 26th day of May, 1879, at the request of Alexander M. Thompson, Conner, for a named consideration of \$750, executed to Lucy A. Thompson, wife of Alexander M. Thompson, a warranty deed for the one hundred and forty acres of land which by mistake had been omitted from his, Conner's deed, to Alexander M. Thompson, as above stated. It was recited in the deed to Lucy A., that said consideration was to be paid and discharged by her, by the payment of two judgments against Conner, one in favor of

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George V. Benton, for \$263, of date May 19th, 1868, and the other in favor of George V. Benton, for \$516, of date May 7th, 1875.

At the time this deed was executed, the one hundred and forty acres, with the balance of the two hundred acres of land, were in the possession of appellant, who was claiming title thereto by virtue of the sheriff's sale as above stated.

After the death of Alexander M. Thompson, leaving Lucy A. as his widow, and on the 22d day of April, 1884, she, by a quitclaim deed, conveyed to appellant all of her right, title and interest in and to the whole of the two hundred acres of land, one hundred and forty acres of which had been conveyed to her by Conner as above stated.

These are the facts upon which appellant predicates his claim of title.

Appellee Benton's claim of title rests upon the following state of facts, found by the court below: On the 7th day of May, 1875, George V. Benton recovered a judgment against Conner, the grantor of Alexander M. Thompson, in the circuit court, for \$516, being one of the judgments mentioned in the deed from Conner to Lucy A. Thompson.

On the 29th day of May, 1884, an execution was issued upon that judgment, and was levied upon the one hundred and forty acres of land which Conner had sold to Alexander M. Thompson, as a part of the two hundred acres, but which by mistake, as above stated, was not described in the deed from Conner to Alexander M. Thompson.

On the 28th day of June, 1884, the sheriff sold the one hundred and forty acres to appellee Benton, who, having paid the purchase-money, received from the sheriff a certificate of purchase.

On the 14th day of May, 1885, Benton received a sheriff's deed for the one hundred and forty acres. At the time of this sheriff's sale, appellant was in the sole and exclusive possession of the land, claiming title thereto as above stated, and on the day of the sale gave notice to appellee that he claimed

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to own the land in fee simple, free from all liens on account of the Benton judgments, and that he would defend his claim and title by law against any one who might buy the land.

It will be observed that appellant's claim of title rests upon the sale and deed from Conner to Alexander M. Thompson in 1865, with the attendant mistake in the description; the sheriff's deed to appellant in 1879, resting upon a sheriff's sale in 1872, and a judgment taken against Alexander M. Thompson in 1871, after his purchase from Conner, and while he was in the possession of the land by virtue of that sale, but when the legal title was still in Conner; Conner's deed to Lucy A., wife of Alexander M. Thompson, made at the request of Alexander M. in 1879, and the deed from Lucy A. to appellant in 1884.

It will be observed, also, that the claim of title by appellee Benton rests upon a judgment taken against Conner in 1875, some ten years after he had parted with all interest in the land, having nothing left except the naked legal title; a sale upon that judgment in 1884, after the deed from Conner to Lucy A., and her deed to appellant, and a sheriff's deed in 1885.

The facts found suggest the following inquiries:

First. Did appellant acquire any title to the land in controversy through the sheriff's sale, based upon the judgment of Harrall against Thompson in 1871, when Conner still held the legal title thereto?

Second. Did appellant acquire any title to the one hundred and forty acres, through the deed from Conner to Lucy A. in 1879, and her deed to him in 1884?

Third. Did appellee acquire any title by his sheriff's deed in 1885, based upon the judgment against Conner in 1875?

As to the first inquiry, it is not necessary, for the purposes of this decision, to say more than that we leave the question there involved, where it was left by the case of *Conner v. Wells*, 91 Ind. 197, without any comment as to the correctness of the ruling in that case.

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We pass then to the second and third inquiries above, which we consider together. Alexander M. Thompson purchased from Conner the whole of the two hundred acres, in 1865, and paid to him the full amount of the purchase-money. By the mistake of the parties and the scrivener, the description in the deed was not such as to carry to Thompson the legal title to the one hundred and forty acres in dispute here. By the sale, the reception of the whole of the purchase-money, and the intended and attempted conveyance by the deed, Conner divested himself of all his interest in and to the whole of the land, retaining nothing but the naked legal title to the one hundred and forty acres, omitted from the deed by mistake. By the same sale, the payment of the purchase-money, and the deed, with the attendant mistake, Alexander M. Thompson became the legal owner of sixty acres of the land, and the equitable owner of the remaining one hundred and forty acres.

Before the discovery of the mistake, and while the land was in the possession of Wells, the Benton judgments were recovered against Conner. Those judgments became liens upon whatever interest Conner then had in the land, and nothing more. But, as we have seen, he had parted with all of his substantial interest. By the mistake of the parties and the scrivener, he held the naked legal title to the one hundred and forty acres, and nothing more.

At any time after the discovery of the mistake, and before Conner conveyed to Lucy A., Alexander M. might have coerced a reformation of the deed, both as against Conner and Benton, the judgment creditor, and thus have acquired the legal title to the one hundred and forty acres. And so, Conner might have conveyed the legal title to Alexander M., free from any liens of the Benton judgments.

Judgments are but general liens, and will not be allowed to stand in the way of prior equities. *Boyd v. Anderson*, 102 Ind. 217, and cases there cited; *Hays v. Reger*, 102 Ind. 524, and cases there cited; *Foltz v. Wert*, 103 Ind. 404,

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and cases there cited; *Wright v. Jones*, 105 Ind. 17, and cases there cited; *Heberd v. Wines*, 105 Ind. 237, and cases there cited.

Conner voluntarily made a deed to Lucy A., at the request of her husband, Alexander M. He had a right to request this, the same as he had a right to request a deed to himself, and Conner had a right to make the deed as requested. That deed carried to Lucy A. the legal title; and having been made at the request of Alexander M., the owner of the equitable estate, the entire estate in and title to the land became vested in her, free from any judgment liens in favor of Benton, unless, as contended, the stipulation in Conner's deed to her, in some way, bound the land for those judgments.

We need not stop to inquire as to whether or not there was any consideration for the agreement and undertaking on the part of Lucy A., as evidenced by that stipulation, as to whether or not, she being a married woman, was bound by that agreement, nor as to whether or not the judgment creditor Benton could, in any way, take advantage of the agreement made with, and the promise made to Conner.

It is sufficient to say here, that judgment liens are not, and can not be, created by agreement. They are purely statutory liens, and if for any reason a judgment is not a lien upon a particular piece of land by force of the statute, it will not become such, so as to be enforced by execution, by the simple agreement of parties, such as that contained in the deed to Lucy A.

Neither was that stipulation in the deed a covenant running with the land, so as to bind it in the hands of appellant, as the grantee of Lucy A.

It amounted simply to a personal undertaking and agreement, on her part, to pay the agreed purchase-money in a particular way, viz., by paying off the Benton judgments. Benton's remedy, if he had any, was a personal action against her upon the agreement, or by an action to enforce a vendor's

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lien. *Graber v. Duncan*, 79 Ind. 565; *Junction R. R. Co. v. Sayers*, 28 Ind. 318; *Bloch v. Isham*, 28 Ind. 37; *Taylor v. Owen*, 2 Blackf. 301.

In speaking of covenants that run with the land, it was said in the case of *Conduitt v. Ross*, 102 Ind. 166: "A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed."

But a concession, that the stipulation in the deed to Lucy A. was a covenant running with the land, would not lend any aid to appellee's title, because it would be necessary to enforce such a covenant by suit. It could not be enforced by issuing an execution upon the judgment.

Our conclusion is, that upon the theory that appellant acquired nothing by his sheriff's deed, Lucy A. by her deed from Conner, made upon the request of Alexander M., became the absolute owner of the land free from any and all judgment liens in favor of Benton, and that, by her deed to appellant, she invested him with a complete title to the land, as against any claim of title that could arise out of the Benton judgment.

Upon the whole case, as made by the facts found, we are clearly of the opinion that the court below erred in its conclusions of law, and in rendering a decree quieting the title in appellee as against appellant; and that the conclusions of law and the decree should have been in favor of appellant as against appellee.

The judgment is, therefore, reversed, with instructions to the court below to restate its conclusions of law, as herein indicated, and to render a decree quieting the title to the land in dispute in appellant, as against appellee, and as against any and all claims of title set up and asserted by him, and as against all others of the defendants who are asserting titles adverse to appellant.

Filed Oct. 12, 1886.

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ON PETITION FOR A REHEARING.

MITCHELL, J.—Counsel for appellee insist that a rehearing of this cause ought to be granted, because the court erred in holding at the former hearing, that the stipulation in the conveyance from Conner to Mrs. Thompson, by which she covenanted to pay certain judgments which had been taken against Conner, and through which judgments the appellee claims title, did not have the effect to create or extend the liens of such judgment.

It is said, in effect, that because Conner held the legal title to the land in controversy, at the time the judgments were taken against him, such judgments became liens on the title so held, and because Mrs. Thompson afterwards accepted a deed from him, which contained a stipulation therein written, that she should pay these judgments, it therefore follows that the judgment liens which, prior to that time, affected only the naked legal title which Conner conveyed to her, were thenceforth effectual to bind her whole estate, both legal and equitable. This conclusion is said to follow from the fact that Alexander M. Thompson, who had from the first a complete and perfect equitable right to the land, agreed with Conner that the latter should convey the naked legal title which he held to Mrs. Thompson, and that by such agreement he recognized the judgments, and consented that they should constitute a valid and binding lien on the land.

This we understood to be the appellee's position from the beginning, and it seems to us the opinion given at the former hearing makes it clear that the position thus taken was not regarded by this court as tenable.

At the time the judgments, through which the appellee claims title, were taken, Conner had no interest whatever in the land, except that, without knowing the fact, he held the naked legal title, Thompson being in possession and both sup-

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posing the latter had a perfect title. The authorities cited in the opinion abundantly show that under such circumstances no effectual lien whatever attaches, as against the actual owner of the land, especially where he is in possession. This, as we understand the appellee's argument, is not disputed.

How, then, can it be said that the liens of the judgments are made more effective on account of the fact that without any consideration whatever Thompson consented that the title which Conner held should be conveyed to his (Thompson's) wife? There was no dispute but that the land belonged to Thompson. Conner set up no claim to it. He had no right in it. If he had conveyed the land to Thompson, under the circumstances, and exacted from him as a condition such an agreement as that contained in the deed, an agreement to pay for that which was confessedly his own, would any one claim that either Conner or his judgment creditors could have enforced the agreement thus exacted against Thompson?

Hence we say again, as we said in effect before, that no matter what voluntary agreement Thompson may have made with Conner, in order to get that which was without adverse claim or dispute his own, and no matter that without any consideration Mrs. Thompson accepted the deed with the stipulation referred to, the judgment liens were in no wise extended or enlarged.

If the agreement had been supported by an adequate consideration, Mrs. Thompson would have been held estopped to assert that the land was not bound by the judgments which it was stipulated she should pay, or if the appellee stood in the attitude of an innocent purchaser for value, like principles would afford him protection. In either case protection would be afforded, not because the liens of the judgments against Conner were extended by any subsequent agreement, but because by the subsequent agreement, supported by an adequate consideration, the appellant would have been estopped to show the facts.

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There is nothing in the record which calls for an application of the doctrine of estoppel—there is no such pretence. The petition for a rehearing is overruled, with costs.
Filed Dec. 23, 1886.

No. 12,757.

AYRES ET AL. v. RANDALL ET AL.

VENDOR AND PURCHASER.—*Assumption of Debt.*—*Agreement to Pay Encumbrance.*—*Enforcement by Creditor.*—*Equity.*—Where a purchaser assumes the payment of a debt owing by his vendor to a third person, or expressly agrees to pay an encumbrance on the land, out of the purchase-money, such agreement inures to the benefit of the creditor, and may be enforced in equity.

SAME.—*Mortgage.*—An agreement between the vendor and purchaser of real estate, in which it is recited that there is a mortgage on the property which the former claims is paid, and which he agrees to have satisfied of record within one year, failing in which the grantee may pay the same out of purchase-money still owing by him, is not such an assumption of the mortgage debt, or such an agreement to pay it, as entitles the mortgagee to maintain an action thereon.

From the Allen Superior Court.

R. S. Robertson, for appellants.

P. A. Randall and W. J. Vesey, for appellees.

MITCHELL, J.—The following statement sufficiently indicates the questions presented for decision :

On the 7th day of August, 1880, Joseph McCreary and wife conveyed certain real estate in the city of Fort Wayne, to Mary C. Swayne, by deed of general warranty. To secure part of the purchase-price, Mrs. Swayne and her husband executed a note for \$300, payable to McCreary in one year, and secured it by a mortgage on the real estate conveyed. This note, which was not payable in bank, was assigned to the appellants, Ayres and Steel, September 1st, 1880. The

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mortgagors afterwards, on the 21st day of March, 1881, conveyed the mortgaged premises to Perry A. Randall, by deed containing a special warranty. No mention of the McCreary mortgage was made in this latter deed, and the grantee did not assume its payment. Subsequently, Ayres and Steel commenced suit against Randall and wife to foreclose the mortgage.

Randall and wife answered in two paragraphs, in which they alleged, in substance, that at the time the warranty deed was made by McCreary to Mrs. Swayne, the lot thereby conveyed was subject to certain liens or charges against the estate of one John Cartwright, who owned the lot at the time of his death, and whose estate remained unsettled. They alleged that it was agreed between McCreary and Mrs. Swayne, at the time the note and mortgage in suit were executed, that whatever sums, if any, she should thereafter be called upon to pay to the administrator of Cartwright's estate, in order to disencumber the lot from the debts owing by the estate, should be applied to the discharge of the note. It was averred that Mrs. Swayne had been obliged to pay a sum in excess of the amount due on the note, and that the note was, therefore, paid.

Pending the foreclosure suit, Randall and wife conveyed the lot by warranty deed to John Humble. At the time the conveyance was made Randall executed to Humble the following agreement:

"This writing witnesseth, that Perry A. Randall and wife have this day sold and conveyed by warranty deed lot 59, in Williams' addition to the city of Fort Wayne, Indiana, to John Humble, for the sum of \$1,350; and whereas, said Humble has paid down the sum of \$800, and has executed his notes for \$550, payable \$200 on or before one year; \$200 on or before two years; \$150 on or before three years, secured by mortgage on said property; and whereas, there is a mortgage of \$300 on said property, executed by Samuel F. and Mary C. Swayne to Joseph McCreary, which the said

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Randall claims is paid, and the said Randall agrees with said Humble, that he will cause said \$300 mortgage to be satisfied of record within a year from this date, and in case he does not, then said Humble may pay and discharge the same and retain the same out of the said sum of \$550, represented by said three notes secured by said mortgage, and he is not to pay any money on said sum of \$550 until the said \$300 mortgage is fully paid and satisfied. This writing is executed simultaneously with said notes and is a part of the same. Any sum said Humble pays in discharge of said \$300 mortgage, shall be considered a payment on said three notes.

"December 2, 1881. (Signed) PERRY A. RANDALL."

On the 9th day of June, 1882, demurrers were overruled to the answers of Randall and wife in the foreclosure suit, and thereupon the plaintiffs in that case refusing to plead further, judgment was given that they take nothing by their suit, and that the defendants recover their costs. Within one year from the rendition of this judgment, the proceeding set out in the record now before us was commenced.

A complaint consisting of three paragraphs was filed. The first paragraph was a complaint for a new trial of the foreclosure suit above referred to, on the ground of newly discovered evidence material to the issues therein. The material evidence alleged to have been discovered since the rendition of the judgment was the agreement between Randall and Humble above set out.

The second paragraph set out substantially the same facts as the first, except that the discovery of the agreement referred to is alleged to be material new matter, upon which a review of the former judgment is claimed. The pleadings, proceedings and judgment in the foreclosure suit are made part of this paragraph.

The third paragraph is in the nature of an independent action against Randall and wife, and Humble and wife, and is apparently predicated on the agreement above recited, a copy of which is annexed to the third paragraph as an exhibit. This

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paragraph recites the execution of the note and mortgage to McCreary, the assignment to the appellants, the institution of the suit to foreclose the mortgage, the conveyance by Randall to Humble pending the suit, the execution of the agreement between Randall and Humble, and that the appellants gave notice that they accepted the provisions of that contract. The plaintiffs pray judgment that Humble be required to pay the sum of four hundred dollars due them on their mortgage debt, and that a lien be declared in their favor on the mortgaged premises.

A demurrer was sustained to the complaint, and from this ruling the case is brought here on appeal.

The appellants' argument in support of each paragraph of their complaint proceeds upon the theory that the agreement between Randall and Humble inured to their, appellants', benefit. They seek to assimilate the agreement to an assumption by a purchaser of an encumbrance upon the land purchased. They argue that in such a case the purchaser becomes the principal debtor, and personally liable for the debt, the payment of which he has assumed as part of the purchase-price.

The principle contended for is well established. Its application is confined to cases in which there is an agreement to pay a recognized encumbrance. It has no application under an agreement such as is here counted on. This agreement recites upon its face that one of the parties to it denied the existence of any debt to the appellants; that he claimed that it was paid off.

We agree that where a purchaser assumes the payment of a debt owing by his vendor to a third person, or where he expressly and in terms agrees to pay off an encumbrance on the land purchased, out of the purchase-price, such agreement inures to the benefit of the creditor, and may be enforced in equity.

The infirmity in the appellants' theory is, the agreement set out does not support their claim. It contains no agree-

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ment to pay. It goes upon the theory that the appellants' debt has already been paid. That the agreement stipulates, in case Randall should fail to secure the release of the mortgage within a year, Humble might pay it, was for the benefit of the latter, and not to provide for the payment of the mortgage as a subsisting debt. Before the expiration of a year it was adjudged that the mortgage was paid, as is shown by the record. This judgment was as effectual to discharge the mortgage as though it had been expressly adjudged that the mortgage should be cancelled.

Without considering the paragraphs of the complaint in detail, it is sufficient to say, the agreement which the appellants have discovered, and upon which the sufficiency of the several paragraphs depends, contains nothing upon which they can predicate a right to the relief asked, in either paragraph of the complaint.

The judgment is affirmed, with costs.

Filed Dec. 21, 1886.

No. 13,503.

MORSE v. THE STATE.

CRIMINAL LAW.—*New Trial.*—*Newly Discovered Evidence.*—A new trial should be granted on the ground of newly discovered evidence where the latter shows a strong probability of innocence.

From the Marion Criminal Court.

B. F. Davis, W. N. Harding and A. R. Hovey, for appellant.

L. T. Michener, Attorney General, for the State.

ZOLLARS, J.—Appellant was convicted and sentenced to one year's imprisonment in the State prison, upon an indictment charging him and another with larceny in the taking

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of a cornet horn, shown by the evidence to be worth less than five dollars.

He based his motion for a new trial, mainly, upon newly discovered evidence, which he could not have produced upon the trial.

We have examined carefully the evidence upon which he was convicted, as, also, the newly discovered evidence, as shown by his affidavit, and the affidavits of the persons whose testimony he seeks to avail himself of upon another trial, and without setting out either, we think it sufficient to say, that in our judgment a new trial ought to be awarded.

The new evidence, as set out in the affidavits, is important to appellant for the purpose of showing, that whatever he may have had to do with the horn, he had no intention of stealing it, nor of assisting another in the commission of such offence.

It may be observed in passing, that the owner of the horn, as shown by his affidavit, has become convinced since the trial, that appellant is not guilty of the crime for which he was convicted.

Judgment reversed, and cause remanded, with instructions to the court below to sustain appellant's motion for a new trial.

Filed Dec. 23, 1886.

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3. *Same.—Natural Watercourse, What is.*—Ravines through which surface water occasionally flows are not natural watercourses within the meaning of the law. To constitute a natural watercourse there must be a bed and banks and evidences of a permanent stream of running water. *Ib.*
4. *Annexation of Unplatted Lands.—Petition of Council to County Commissioners.—Sufficiency when Signed by Mayor Only.—Collateral Attack.*—Where the petition to the board of county commissioners for the annexation of unplatted land to a city, upon its face, appears to be the petition of the mayor and common council, but is signed by the mayor only, it is sufficient under section 3196, R. S. 1881, at least as against a collateral attack, after the board has acted upon it as the petition of the council. *Huff v. City of Lafayette*, 14
5. *Same.—Contiguity.—Consent of Land-Owner.—Presumption.*—Where it is proposed to annex several tracts of land, under section 3196, all need not be contiguous to the city; but it is sufficient if they are contiguous to each other and one is contiguous to the city, and in a collateral attack upon the annexation proceedings, it will be presumed that the lands annexed were contiguous and unplatted, and that the owners would not consent to the annexation, unless the contrary is shown. *Ib.*
6. *Same.—Petition.*—It is not necessary that the petition for annexation should state that the land-owners will not consent to an annexation by the common council of the city. *Ib.*
7. *Same.—Notice.*—Notice of the presentation of the petition to the county commissioners is not insufficient because signed by the mayor only, and because it does not contain the name of one of the land-owners and particularly describe his land. *Ib.*

8. *Same.*—Where there is notice in the manner provided by the statute, it is sufficient as against a collateral attack. *Ib.*
9. *Evansville.*—*Special Charter.*—*Amendment.*—The special charter granted to the city of Evansville in 1847, may be amended by special or general acts. *City of Evansville v. Summers, 189*
10. *Same.*—*Street Improvement.*—*Payment of Part of Cost Out of City Treasury.*—*Section 53 of Charter not Repealed by Act of 1885.*—Section 53 of the special charter of the city of Evansville, as amended in 1881 (Acts of 1881, p. 22), providing that such city may pay a part of the cost of street improvements out of its treasury, is not repealed or affected by the general act of April 13th, 1885 (Acts of 1885, p. 207). *Ib.*
11. *Negligence.*—*Excavation in Stream at Street Crossing.*—*Knowledge that Children Play in Vicinity.*—*Safeguards.*—*Liability.*—Where a city, while constructing a bridge, makes an excavation in the bed of a shallow stream where it is crossed by a street, and constructs a levee from the bank to the pit, and, knowing that the children of persons residing near are accustomed to play in the vicinity, leaves it, in the absence of workmen, without safeguards of any kind, by reason of which a child five years old while at play, without any fault on the part of its parents, falls into the pit and is drowned, it is liable in an action for damages. *City of Indianapolis v. Emmelman, 530*
12. *Same.*—*Evidence.*—*Safety of Stream Prior to Excavation.*—Where, on the trial of the action, the mother testified to the general character of the stream and to its comparative safety for children before the excavation was made therein, further testimony that she had never, before the death of her child, heard of any one being drowned in the stream, is admissible. *Ib.*
13. *Same.*—*Liability for Injury to Child.*—The liability of a city is the same where a child, rightfully in a street, sustains an injury from a defect created therein by the city, as where an adult, who is free from fault, is injured from a like cause. *Ib.*
14. *Same.*—*Negligence of Parents.*—Negligence can not be imputed to parents who permit a child of tender years to go to a place where it has a right to be, and at which there is no reason to suspect danger, and which is safe, unless another is guilty of a breach of duty. *Ib.*

COLLATERAL SECURITY.

See PRINCIPAL AND SURETY; PROMISSORY NOTE, 4.

COMMON CARRIER.

See NEGLIGENCE; RAILROAD, 8, 9.

COMMON SCHOOLS.

See SCHOOLS; TAXES, 5.

CONSIDERATION.

See ACCOUNT, 2; CONTRACT, 1, 2, 5, 7, 9, 11 to 14; DEED, 1, 2, 10; ESTOPPEL; EVIDENCE, 1; PROMISSORY NOTE, 3, 4, 8, 9, 12; SALE, 5, 7.

CONSTITUTIONAL LAW.

See PATENT RIGHT, 1; TAXES, 5 to 7.

CONTINUANCE.

See CRIMINAL LAW, 19, 20, 24; JURISDICTION.

CONTRACT.

See ACCOUNT; EVIDENCE, 1; INFANT; JUDGMENT, 4; MARRIED WOMAN, 5, 6; PROMISSORY NOTE, 8; SALE, 4 to 6; STATUTE OF LIMITATIONS; VENDOR AND PURCHASER, 2 to 4.

1. *Parol Contradiction of.*—*Debtor and Creditor.*—*Release of Indebtedness.*—

Contemporaneous Parol Agreement.—Where there is a written contract between creditors and their debtor, made in consideration of a transfer by the latter of certain property to a trustee for the former, that the creditors will release and discharge the debtor from his indebtedness to each of them, it can not be limited or contradicted by a creditor by showing a contemporaneous parol agreement with the debtor excepting certain notes from the terms of the written contract.

Fordice v. Scribner, 85

2. *Consideration.*—*Agreement not to Sue for Reformation of Mortgage.*—A promise, made upon an agreement not to sue for a reformation and foreclosure of a mortgage, is founded on a sufficient consideration.
McCasland v. Aetna L. Ins. Co., 180
3. *Same.*—*Delivery.*—*Condition.*—*Performance.*—*Statute of Frauds.*—A contract, which is so far executed as that a deed has been delivered under it conditionally, is taken out of the statute of frauds when the condition is performed. *Ib.*
4. *Pleading.*—*Acceptance of Proposition.*—Where facts are pleaded which show an acceptance of a proposition, it is not necessary to allege an acceptance in express terms. *Ib.*
5. *Competitive Bidding on Public Works.*—*Agreement to Forebear.*—*Fraud.*—*Partnership.*—*Public Policy.*—No enforceable right can be predicated upon an agreement of partnership, the effect of which is to stifle or diminish competitive bidding on public works and to perpetrate a fraud on public officers.
Hunter v. Pfeiffer, 197
6. *Loan of Money Without Stipulation for Credit.*—*When Becomes Due.*—Where money is loaned without any stipulation for credit, it becomes due presently.
Wagoner v. Wilson, 210
7. *Fraud.*—*Rescission.*—*Status Quo.*—A party who has been fraudulently led into the making of an entire contract, must, upon discovering the fraud, with reasonable promptness avoid the contract as a whole; but where no rights have been actually surrendered and no benefits acquired under it, no formal restoration of the *status quo* is necessary.
Higham v. Harris, 246
8. *Same.*—*Equity.*—*Showing for Rescission.*—Where, in a case of equitable cognizance, a contract which ought not to be enforced is insisted upon, it is sufficient if the party whose rights are affected makes it appear that he has done nothing which makes it impossible for the court to decree a rescission, if the facts warrant it. *Ib.*
9. *Same.*—*Divisible Contract.*—*Rescission as to Part.*—Where a contract is divisible, each part independent of the other and resting upon a consideration peculiar to itself, the injured party may retain the subject of one part, and, having tendered the consideration received, may treat another part as rescinded at law, or he may maintain a suit in equity to rescind one part while adhering to another. *Ib.*
10. *Same.*—*Incomplete Written Contract.*—*When Regarded as Oral.*—*Evidence.*—Where parol evidence is necessary to make a contract complete by supplying an essential part, the contract will be regarded as in parol, except to the extent that it is controlled by the statute. *Ib.*
11. *Same.*—*Consideration.*—*Burden of Proof.*—One who relies upon an oral contract, or upon an agreement in writing which does not show upon its face that it was made upon an adequate consideration, must aver and prove that it is supported by a sufficient consideration. *Ib.*
12. *Consideration.*—*Parol Proof of Collateral or Contemporaneous Agreement.*—Where a collateral agreement, whether oral or written, constitutes a condition upon which the performance of a written contract depends, or where a contemporaneous agreement of one party forms the consid-

eration for the written contract, such collateral or contemporaneous agreement may be shown. *Singer M'fg Co. v. Forsyth, 334*

13. *Same.—Guaranty Bond.—Action on.—Consideration.—Showing Concurrent Contract of Agency.*—In an action upon a bond, guaranteeing the payment, by the principal obligor, of every indebtedness to the obligee then existing or which might thereafter be incurred, but which states no consideration and shows by implication that it is collateral to some other agreement not mentioned, it may be averred and proved by parol that the consideration of the bond was a contract of agency executed concurrently with it. *Id.*
14. *Same.—Liability of Guarantors.—Bond and Contract Construed Together.*—In such case, the bond and the contract of agency, having been executed contemporaneously, are to be construed together, and the obligation of the bond will be limited to indebtedness arising under and embraced by such contract. *Id.*

CONVEYANCE.

See DEED; EVIDENCE, 1; FRAUDULENT CONVEYANCE; GUARDIAN AND WARD; HUSBAND AND WIFE; MARRIED WOMAN, 1; TRUST AND TRUSTEE; VENDOR AND PURCHASER.

CORPORATION.

See INJUNCTION; INSURANCE, 4 to 6; RAILROAD; TELEGRAPH COMPANY.
Agency in County Must Exist when Suit is Brought.—In an action against a corporation under section 309, R. S. 1881, an agency for the transaction of business must be shown to exist in the county at the time suit is commenced. *Indiana Ins. Co. v. Capehart, 270*

COUNTY.

See COUNTY COMMISSIONERS; GRAVEL ROAD, 6; POOR; TOWNSHIP TRUSTEE.

COUNTY AUDITOR.

See TAXES, 1, 2.

COUNTY COMMISSIONERS.

See CITY, 4 to 8; GRAVEL ROAD; INJUNCTION; POOR.

Right to Sue for Moneys Due County.—Settlement with Treasurer.—Mistake.—An action against a former county treasurer individually to recover moneys due from him to the county, by reason of a mistake on the part of the county whereby he had been given credit on final settlement for county orders which had been previously redeemed and for which he had been given full credit in other settlements, may properly be brought by and in the name of the board of county commissioners. Section 6506, R. S. 1881, providing that actions shall be brought by the State, on the relation of State and county auditors, in certain cases, does not apply. *Board, etc., v. Kimberlin, 449*

COUNTY TREASURER.

See COUNTY COMMISSIONERS; CRIMINAL LAW, 2 to 4.

COVENANT.

See DEED; VENDOR AND PURCHASER, 2.

CRIMINAL LAW.

See JUROR; TAXES, 11 to 15.

1. *Information.—Description of Offence.—Omission of Word "Unlawful"—Use of Equivalent Words.*—An information charging assault and battery with intent to murder is not bad for omitting the word "unlawful" from the description of the offence, if words of equivalent meaning are used. *Franklin v. State, 47*

2. *Embezzlement by Public Officer.—Repeal of Statute.*—Section 1943, R. S. 1881, defining the offence of embezzlement by public officers, was repealed by implication by the act of March 5, 1883 (Acts 1883, p. 106), upon the same subject, without any saving clause.
State v. Mason, 48
3. *Same.—Saving Clause.*—Where a law prescribing penalties has been repealed, there can be no further prosecutions under it, unless the repealing statute contains a saving clause authorizing the same. *Ib.*
4. *Same.—County Treasurer.—Embezzlement.—Indictment.—Statute of Limitations.*—Under section 1943, R. S. 1881, a prosecution against a county treasurer for embezzlement of public funds should have been begun within two years after such officer failed, at the expiration of his term, to pay over such funds to his successor, and the allegation of demands and refusals subsequent to that time would not take the indictment out of the operation of the statute. *Ib.*
5. *Indictment.—Language of Statute.—Motion to Quash.*—An indictment which, in the language of the statute, charges an assault and battery with intent to commit rape, is sufficient on a motion to quash.
Skaggs v. State, 53
6. *Same.—Weight of Evidence.*—A judgment will not be reversed on the mere weight of conflicting evidence. *Ib.*
7. *Same.—Witness.—Interpreter.—Sign Language.*—Although one may not be an adept in the sign language, he may nevertheless be a competent interpreter in the examination of a deaf and dumb witness, and the accuracy of the interpretation is a question of fact for the decision of the jury. *Ib.*
8. *Same.—Court May Appoint More than One Interpreter.*—The trial court may appoint as many interpreters as it deems necessary to get the facts before the court and jury. *Ib.*
9. *Same.—Manner of Examination Through Interpreter.—Discretion.*—The manner in which examinations through interpreters shall be conducted is a matter to be regulated by the trial court, in its discretion, and will not be reviewed on appeal, in the absence of a showing of injury. *Ib.*
10. *Same.—Modest Deaf and Dumb Witness.—Obtaining Answer to Question in Private.*—Where a question is propounded to a deaf and dumb witness which so shocks her modesty that she flees from the court room to an adjoining room, whither she is followed by an interpreter, without direction from the court or objection by the defendant, who, in such seclusion, obtains her answer to the question, and both returning immediately to the court room, the answer is given to the jury, without a repetition of the question to the witness, the irregularity is not available, in the absence of a showing of injury. *Ib.*
11. *Same.—New Trial.—Newly Discovered Evidence.—Diligence.*—Where a new trial is asked on the ground of newly discovered evidence, it must be shown that the moving party could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial; and the facts which show such diligence must be stated. *Ib.*
12. *Same.—Imposing Unauthorized Penalty.—Objection to Judgment.*—An error of the trial court in imposing a penalty not assessed by the jury, nor authorized by the statute defining the offence of which the defendant is found guilty, is not available on appeal unless the question was raised in the trial court by an objection, in some form, to the judgment. *Ib.*
13. *Larceny.—Use of Word "Haul" Instead of "Carry" in Indictment.*—

The use of the word "haul," instead of the statutory word "carry" (section 1934, R. S. 1881), in an indictment charging that the defendant "did feloniously steal, take and haul away" certain personal property, will not render the indictment bad on motion to quash, the words being in one sense equivalent. *Spittorff v. State, 171*

14. *Same.—Change of Venue from County.—Discretion of Court.*—The refusal of a change of venue from the county is a matter wholly in the discretion of the trial court, in the absence of an abuse thereof. *Ib.*
15. *Same.—Bailiff of Grand Jury as Juror.—New Trial.*—The fact that one of the jurors on the trial of an indictment was bailiff of the grand jury which returned it, and was accepted as a juror without knowledge of such fact until after verdict, is not ground for a new trial, unless it also appears that while acting as bailiff he was present during the deliberations of the grand jury, or was otherwise disqualified. *Ib.*
16. *Same.—Evidence.—Description of Stolen Property.—Production of in Court.*—On the trial of an indictment for larceny, the kind and quality of the property alleged to have been stolen, and subsequently found in the possession of one of the persons accused, may be described by the owner, without being produced in court, although such property is in the hands of the sheriff who had taken it on a search-warrant. *Ib.*
17. *Same.—Self-Serving Declarations.—Res Gestæ.*—Statements of the accused, which are not a part of the *res gestæ*, but in the nature of self-serving declarations, are not competent evidence in his behalf. *Ib.*
18. *Perjury.—Material Matter.*—An indictment for perjury can not be predicated upon an oath in relation to an immaterial matter. *State v. Reynolds, 353*
19. *Continuance.—Affidavit.—Attaching Previous Affidavit to Application.*—An affidavit for a continuance must set out all the facts, as they exist at the time, essential to support the application. It is not sufficient to attach to the affidavit presented an affidavit filed at a preceding term, and refer to the facts therein stated. *Sutherland v. State, 353*
20. *Same.—Continuance to Take Deposition.—Application for Second Continuance.*—Where a cause is continued that the defendant may take the deposition of an absent witness, an application for another continuance at a subsequent term to procure the testimony of such witness, which states no reason for failing to take the deposition, is bad. *Ib.*
21. *Same.—New Trial.—Newly Discovered Evidence.—Cumulative and Impeaching.*—Newly discovered evidence of a merely cumulative character, or which tends only to the impeachment of a witness without rendering a different result of the trial probable, is not sufficient ground for a new trial. *Ib.*
22. *Same.—Instructions.—Practice.*—Where it is assigned as cause for a new trial that the court erred in giving or refusing instructions, the particular instructions upon which error is predicated must be specified with reasonable certainty. *Ib.*
23. *Seduction.—Promise of Marriage.—Evidence.*—In a prosecution under section 1992, R. S. 1881, for the seduction, under a promise of marriage, of a female minor, it must be shown that the intercourse took place subsequent to the promise of marriage, and that such promise was the inducement to the intercourse. For evidence held sufficient, see opinion. *Phillips v. State, 406*
24. *Same.—When Affidavit for Continuance Admissible in Evidence.*—Where a trial is had before the court, without a jury, it is not error to admit in evidence an affidavit for a continuance made and filed at a pre-

ceding term by the defendant, and acted upon by the same judge who presides at the trial. *Ib.*

25. *Arraignment and Plea.—New Trial.—Practice.*—An assignment as a cause for a new trial, that the finding of the court is contrary to law, is sufficient to present the question that the trial was had without arraignment or plea. *Bowen v. State, 411*
26. *Same.—Trial Without Plea Erroneous.—Record Must Affirmatively Show Plea.—Recital in Bill of Exceptions.*—Unless the record in a criminal cause affirmatively shows that a plea to the indictment was entered, either by or for the defendant, the trial is erroneous, and if it fails to show such fact, the defect can not be supplied or cured by a recital in a bill of exceptions, filed subsequent to the trial, that a plea was entered. *Ib.*
27. *New Trial.—Newly Discovered Evidence.*—A new trial should be granted on the ground of newly discovered evidence where the latter shows a strong probability of innocence. *Morse v. State, 599*

DAMAGES.

See DEMURRER TO EVIDENCE; HIGHWAY, 2; INFANT, 4; LANDLORD AND TENANT, 5; MALICIOUS PROSECUTION, 2; NEGLIGENCE, 8; NEW TRIAL, 6, 7; PARTITION FENCE; RAILROAD, 2; REPLEVIN, 5; SALE, 4, 6; SUPREME COURT, 10; TELEGRAPH COMPANY, 4; TOWN; TRUST AND TRUSTEE.

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKS AND BANKING; CONTRACT, 1; FRAUDULENT CONVEYANCE, 1, 2; HUSBAND AND WIFE; PRINCIPAL AND SURETY; VENDOR AND PURCHASER, 3, 4.

DECEDENTS' ESTATES.

See APPEAL, 3; BANKS AND BANKING; EVIDENCE, 4; LANDLORD AND TENANT, 1 to 3, 6; PRINCIPAL AND AGENT; REPLEVIN, 5; WILL; WITNESS, 3.

1. *Evidence.—Self-Serving Declarations of a Decedent.—When Admissible.—Res Gestæ.*—Self-serving declarations of a decedent, made in the absence of the other party, are not admissible in behalf of his administrator, unless they qualify and give character to some act which is material to the issue, and are thus a part of the *res gestæ* of such act. *Brown v. Kenyon, 285*
2. *Appeal.—Application to Supreme Court for Leave.—Notice.—Practice.—Res Judicata.*—Where an appeal from a decision affecting a decedent's estate is not taken within the time limited by section 2455, R. S. 1881, and afterwards an application is made to the Supreme Court for leave to appeal, the adverse party, when practicable, is entitled to notice of such application; but where leave is granted without such notice, and both parties are brought into court, the matter will be treated as adjudicated, and a subsequent motion to dismiss will be overruled. *Duncan v. Gainey, 579*
3. *Same.—Will.—Charging Land Devised With Payment of Debts.—Other Property not Released.*—A provision in a will, charging the land devised to the testator's widow with the payment of all claims against his estate, does not release property left to other devisees from sale in the event that devised to the widow shall be insufficient to pay the debts. *Ib.*
4. *Same.—Unauthorized Sale of Land by Administrator.—Re-Sale.*—An administrator has no authority, in the absence of a testamentary provision to that effect, to sell real estate of his decedent, except upon the order of the proper court, and where a sale is made without such authority, the purchase-money does not become assets in the hands of

the administrator, and the purchaser takes the land subject to its liability to be again sold under legal proceedings for the payment of debts. *Ib.*

5. *Same.—Rights of Purchaser.—Subrogation.*—But where, in such case, the purchase-money derived from such unauthorized sale, is by special arrangement applied on debts of the estate, the purchaser becomes the equitable owner of such debts and is entitled to be subrogated to all the rights of the original holders, according to their respective priorities, but his lien is of no greater extent. *Ib.*

DECLARATIONS.

See CRIMINAL LAW, 17; DECEDENTS' ESTATES, 1; EVIDENCE, 4, 7; WILL, 12.

DEED.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; EVIDENCE, 1; GUARDIAN AND WARD; REAL ESTATE, ACTION TO RECOVER, 3; TAXES, 1; VENDOR AND PURCHASER.

1. *Reformation.—Voluntary Conveyance.—Valuable Consideration.*—Equity will not intervene for the reformation of a deed which is purely voluntary; but a deed, made by a father to a son in consideration of services rendered and of love and affection, may be reformed. *Ib.*

Baker v. Pyatt, 61

2. *Same.—Complaint for Reformation.—Showing of Consideration.*—A complaint to reform a deed made to the plaintiff by his father, which alleges that the consideration was love and affection and a specified sum of money, is sufficient on demurrer as showing a conveyance upon a valuable consideration. *Ib.*

3. *Same.—Mutual Mistake of Fact.—Description.—Family Settlement.*—A father, desiring to divide his lands among his children, executed a deed to each, intending to convey a certain portion, and each took possession of the particular tract he was to receive by the arrangement. Afterwards the plaintiff, a son of the grantor, discovered that the description which had been inserted in his deed by the scrivener, with the knowledge of both parties, did not, as they supposed it did, carry to him the tract intended to be conveyed, and of which he had taken possession, but covered a tract not owned by the father. Suit, after the death of the father, against another child, for a reformation of the deed. *Ib.*

Held, that the mistake was one of fact, and mutual, and that the plaintiff is entitled to a reformation.

4. *Same.—Pleading.—When Judgment will not be Reversed for Want of Exhibit.*—Where the merits of the cause have been fairly determined, the judgment will not be reversed because a copy of the deed was not filed with the complaint. *Ib.*

5. *Mistake.—Reformation.—Question of Fact.*—Where a mistake in describing land intended to be conveyed is as to the identity of the land, it is a mistake of fact and not of law. *McCasland v. Anna L. Ins. Co., 130*

6. *Same.—Representation as to Description.—Pointing Out Land.*—Where a party points out a specific parcel of land to another and represents that it is described in a particular way, the latter has a right to rely on the statement. *Ib.*

7. *Parol Evidence Can Not Defeat.*—The conveying part of a deed can not be overthrown by parol evidence. *Henry v. Stevens, 281*

8. *Cancellation.—Quieting Title.—Complaint by Heirs.—Showing of Interest.*—An allegation in a complaint to cancel a deed and quiet title, that the plaintiffs "are the heirs, and the only heirs, of" the grantor, who, it is averred, died on a certain date, shows that the plaintiffs have

such an interest in the property as entitles them to maintain the action.
Physio-Medical College v. Wilkinson, 314

9. *Same.—Mental Incapacity to Convey.—Old Age.—Presumption as to Continuance of Incapacity.—Pleading.*—A complaint by heirs to set aside a deed made by the ancestor three years before her death, alleging that at the date of the deed she was eighty years old, and so enfeebled and debilitated as to be of unsound mind and incapable of comprehending the nature of a contract, is good without averments that she had not subsequently been restored to reason, and had not ratified the contract, as it will be presumed, in such a case, until the contrary is made to appear, that the grantor remained of unsound mind. *Hardenbrook v. Sherwood, 72 Ind. 403, distinguished. Ib.*
10. *Same.—Rescission.—Consideration.—When Need Not be Restored or Tendered.*—Where the consideration received by an insane grantor is neither necessary nor beneficial to him, upon his death a rescission of the conveyance may be had by his heirs without restoring or tendering what was received, although the grantor's insanity had not been judicially declared, and the grantee acted without knowledge of his incapacity. *Ib.*
11. *To Heirs of Living Person.—Different Construction by Acts of Grantor.—Action for Possession.—Estoppel.*—The appellant, in 1871, by warranty deed, which he caused to be recorded, conveyed "to Anna Lyles and Isaac Lyles' heirs," the real estate which he now seeks to recover from a remote grantee of Anna Lyles, who conveyed it without objection by appellant, after the death of her husband. Isaac and Anna Lyles paid no consideration for the land, but were living on it when appellant executed the deed, and had children then living. There has been continuous possession by the Lyles and their immediate and remote grantees.
Held, that the deed executed by appellant is, on its face, a grant to the heirs of Anna and Isaac Lyles jointly.
Held, also, that the parties, by their acts, having placed such a construction upon it as to render it effectual as a conveyance, the grantor is estopped to assert title as against subsequent good-faith purchasers.
Lyles v. Lescher, 382
12. *Same.*—The rule, that a deed to the heirs of a person in life is void for uncertainty, doubted. *Winslow v. Winslow, 52 Ind. 8, criticised. Ib.*
13. *Escrow.—Delivery Before Performance of Condition.—Fraud.—Estoppel.—Good-Faith Purchaser.*—Where a deed is executed and placed in the hands of a third person to be delivered to the grantee, who is already in possession of the land, only upon payment of the purchase-money, but such third person, in violation of his duty, delivers the deed, on fraudulent representations of the grantee, before the performance of the condition, and it is duly recorded, the grantor is estopped to assert title as against a subsequent good-faith purchaser.
Quick v. Milligan, 419
14. *Covenant Running with Land.*—A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.
Wells v. Benton, 585

DELIVERY.

See CONTRACT, 3; DEED, 13.

DEMAND.

See PRINCIPAL AND AGENT.

DEMURRER TO EVIDENCE.

1. *What it Admits.*—A demurrer to the evidence admits all facts which

the evidence tends to prove, or of which there is any evidence, however slight, and all inferences which can be logically and reasonably drawn from the evidence. *North British, etc., Ins. Co. v. Crutchfield, 518*

2. *Same.—Assessment of Damages.—Evidence.—Presumption.*—Where there is a demurrer to the evidence and the jury is discharged, and, after the demurrer is overruled, the assessment of damages is submitted to the court, neither party asking for another jury, it will be presumed, if the record is silent, that the court heard all necessary evidence on the question of damages. *Ib.*

DEPOSITION.

See CRIMINAL LAW, 20.

DESCENT.

See EXECUTION; GUARDIAN AND WARD; MORTGAGE, 2, 6; WILL, 3, 6, 13, 14.

DESCRIPTION.

See DEED, 1 to 3, 5, 6; REAL ESTATE, ACTION TO RECOVER, 3; WILL, 11, 12.

DILIGENCE.

See CRIMINAL LAW, 11; INFANT, 4.

DISCRETION.

See CRIMINAL LAW, 9, 14; TAXES, 6; WITNESS, 1.

DIVORCE.

See FRAUDULENT CONVEYANCE, 4.

DOMESTIC RELATIONS.

See GUARDIAN AND WARD; HUSBAND AND WIFE; MARRIED WOMAN; MASTER AND SERVANT.

DONATION.

See RAILROAD, 1, 2.

DRAINAGE.

1. *Notice.—Acquiescence in Validity of Proceedings.—Estoppel.*—Where, in giving notice in a drainage proceeding, there is an attempt to comply with the statute, and some notice is given, though insufficient, parties who have actual knowledge of the petition and the proceedings under it, and that money has been expended on the faith that the proceedings are valid, and make no objection, will be presumed to have acquiesced in their validity, and can not afterwards move to dismiss for want of notice. *Vizzard v. Taylor, 97 Ind. 90, distinguished.*
Peters v. Griffec, 121
2. *Complaint to Enforce Assessment.—Petition.—Notice.—Matters of Defence.*—A complaint to enforce a drainage assessment, which shows that there was a petition and notice, and a judgment establishing the drain and confirming the assessments, is good without an averment that the defendant's land was described in the petition, or that his name appeared in the petition or notice, these being matters of defence.
Deegan v. State, etc., 155
3. *Same.—Irregular Notice.—Jurisdiction.—Collateral Attack.*—The drainage law of 1883 requires the petition to be filed before the notices are posted, but the fact that it is filed the day after is a mere irregularity, and not in itself sufficient to defeat the collection of an assessment. *Ib.*
4. *Appearance.—Waiver of Notice.*—Where, in a drainage proceeding, parties appear without objecting to the sufficiency of the notice, they waive their right to question it. *Carr v. Boone, 241*
5. *Same.—Insufficient Notice to One not Available to Others.*—The fact that

- one or more land-owners are not notified, will not vitiate the proceedings as to those having notice. *Ib.*
6. *Same.—Joint Motion Must be Good as to all Uniting.*—A joint motion, or a joint assignment of error, which is not good as to all who unite therein, can not be sustained. *Ib.*
7. *Same.—Proof of Posting Notices.—Affidavit.*—Proof of the posting of notices need not be made by affidavit, but may be made in any other legal method, and hence it is not essential that the record should contain affidavits of such fact. *Ib.*
8. *Same.—Judgment as to Notice.*—A formal judgment, declaring the notice sufficient, is not necessary where the judgment as rendered involves and adjudicates that question. *Ib.*
9. *Same.—Second Notice.—When May be Ordered.*—Where the notice first given is not sufficient, the court may order a second notice, provided there is no unreasonable delay and no prejudice to substantial rights. *Ib.*
10. *Same.—Defects in Notice not Available to Petitioner.*—The petitioner for drainage can not avail himself of any defect in the notice nor object to the manner in which it is proved. *Ib.*
11. *Same.—When Petitioner May not Dismiss.*—The petitioner can not dismiss his petition after the report of the commissioners has been filed and confirmed, and rights have been acquired and money expended thereunder, notwithstanding the order approving the report has been vacated on the joint motion of himself and the commissioners for additional notice to omitted parties. *Ib.*
12. *Pending Proceedings Under Prior Acts not Affected by Act of 1885.*—A drainage proceeding begun under the acts of 1881 and 1883, and pending when the act of 1885 (Acts of 1885, p. 129) went into force, was in no way affected by the latter act. *Claybaugh v. Baltimore, etc., R. W. Co., 262*
13. *Same.—Report of Commissioners.—Failure to File at Time Fixed.—Dismissal of Proceedings.*—Where, in a drainage proceeding under the acts of 1881 and 1883, the report of the commissioners is not filed at the time fixed by the court, and no extension of time is then asked or other action taken, the petition may be dismissed on the motion of a party affected. *Ib.*

EJECTMENT.

See REAL ESTATE, ACTION TO RECOVER.

EMBEZZLEMENT.

See CRIMINAL LAW, 2 to 4.

EQUITY.

See CONTRACT, 7 to 9; DECEDENTS' ESTATES, 5; JUDGMENT, 2, 4; REAL ESTATE, ACTION TO RECOVER, 1 to 4; SALE, 1; SUPREME COURT, 7; VENDOR AND PURCHASER, 3, 4.

ESCROW.

See DEED, 13.

ESTOPPEL.

See ACCOUNT, 2; APPEAL, 1, 2; DEED, 11, 13; DRAINAGE, 1; GUARDIAN AND WARD; JUDGMENT, 1; MARRIED WOMAN, 1 to 3, 6; PROMISSORY NOTE, 5; REPLEVIN, 4 to 8; SHERIFF'S SALE, 3, 4; WILL, 14.

1. *Account.—Acknowledgment of Incorrect Amount.—Showing of Truth.—Consideration.—Notice.*—A written acknowledgment, made without consideration, as to the amount of an account, does not preclude the party making it from showing, as against persons who have notice

of its incorrectness before acting upon it, that the account as stated is not correct. *Higham v. Harris, 246*

2. *Fraud*.—There can be no estoppel where there is no fraud, but there may be fraud although there was no preconceived design to mislead or deceive. It may consist in the denial of what has been previously affirmed. *Ward v. Berkshire L. Ins. Co., 301*

EVANSVILLE, CITY OF.

See CITY, 9, 10.

EVIDENCE.

See ACCOUNT, 2; BILL OF EXCEPTIONS; CITY, 12; CONTRACT, 1, 10 to 13; CRIMINAL LAW, 6 to 11, 16, 17, 20, 21, 23, 24, 27; DECEDENTS' ESTATES, 1; DEED, 7; DEMURRER TO EVIDENCE; HIGHWAY, 1 to 3; INSURANCE, 1, 2; MALICIOUS PROSECUTION; NEGLIGENCE, 1, 2, 5 to 7; PARTITION FENCE, 3; POOR, 4; PRACTICE, 2, 4 to 7, 10; PROMISSORY NOTE, 2, 3; RAILROAD, 7; REAL ESTATE, ACTION TO RECOVER, 1; REPLEVIN, 4, 5; SALE, 1, 2; SPECIAL FINDING, 2, 3; SUPREME COURT, 2, 5, 7, 12; TAXES, 1; TRUST AND TRUSTEE; WITNESS.

1. *Conveyance*.—*Contract*.—*Consideration*.—*Conversation*.—*Res Gestæ*.—Where the consideration for a conveyance of land is in issue, and the contract is in parol and the grantor dead, the conversation of the parties, relative to the consideration, while conducting the negotiations resulting in the contract, is admissible as part of the *res gestæ*. *Porter v. Walz, 40*
2. *Location of Real Estate may be Shown by Parol*.—It may be proved by parol that certain described real estate is situate within the corporate limits of a city. *McKeen v. Haskell, 97*
3. *Tax Assessments*.—*Value of Property*.—Assessment lists for taxation are not competent evidence either for or against the lister, to establish the value of property for purposes other than taxation; especially so where it is sought to arrive at the value of one article by proving the value of others with which that in question was listed. *Cincinnati, etc., R. R. Co. v. McDougall, 179*
4. *Self-Serving Declarations of a Decedent*.—*When Admissible*.—*Res Gestæ*.—Self-serving declarations of a decedent, made in the absence of the other party, are not admissible in behalf of his administrator, unless they qualify and give character to some act which is material to the issue, and are thus a part of the *res gestæ* of such act. *Brown v. Kenyon, 283*
5. *Objection to Admission of Must be Specific*.—An objection to the admission of evidence, that it is "irrelevant, incompetent and immaterial," is too indefinite and uncertain to present any question on appeal. *McCullough v. Davis, 298*
6. *Same*.—*Destroyed Records*.—*Latitude Allowable in Admission of Parol Evidence*.—Much latitude is allowable in the admission of parol evidence to supply what has been lost by the destruction of papers and records. *Id.*
7. *Will*.—*Declarations of Testator*.—Verbal declarations of a testator are not competent evidence to show a mistake in a will, but facts and circumstances are. *Poeck v. Redinger, 573*

EXECUTION.

See FRAUDULENT CONVEYANCE, 1; SHERIFF'S SALE.

Real Estate.—*Will*.—*Determinable Fee*.—*Husband and Wife*.—*Sale*.—Where, by the will of her father, a daughter is given land in fee simple, subject only to the contingency that she shall die without issue, or that her surviving issue shall die before arriving at full age, the estate

taken is a determinable fee, and upon her death her husband succeeds to an undivided one-third in fee, subject only to the same contingency, and such third is subject to sale on judgments rendered against him.
Greer v. Wilson, 322

EXECUTORS AND ADMINISTRATORS.

See BANKS AND BANKING; DECEDENTS' ESTATES; LANDLORD AND TENANT, 1 to 3, 6; WILL, 10.

EXEMPTION FROM EXECUTION.

See FRAUDULENT CONVEYANCE, 1, 2.

EXHIBIT.

See DEED, 4; PLEADING, 1, 6, 7, 9, 20; PROMISSORY NOTE, 1.

EXPERT.

See CRIMINAL LAW, 7; NEGLIGENCE, 7.

FAMILY SETTLEMENT.

See DEED, 3.

FEES AND SALARIES.

See TOWNSHIP TRUSTEE; WITNESS, 2.

FENCE.

See PARTITION FENCE.

FORECLOSURE.

See APPEAL, 2; MORTGAGE.

FOREIGN CORPORATION.

See INSURANCE, 4 to 6.

FORMER ADJUDICATION.

See GUARDIAN AND WARD; REPLEVIN, 6 to 8.

FRAUD.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3, 4; CONTRACT, 5, 7 to 9; DEED, 13; ESTOPPEL; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; INFANT, 4; MARRIED WOMAN, 3; NEW TRIAL, 1 to 3; PRINCIPAL AND SURETY; SALE, 2, 3.

FRAUDULENT CONVEYANCE.

See HUSBAND AND WIFE; NEW TRIAL, 1 to 3.

1. *Exemption from Execution.*—Debtor and Creditor.—Husband and Wife.—Where a debtor, having at the time less money and property than he is entitled to under the exemption laws, purchases real estate, which he causes to be conveyed to his wife and children, the conveyance, nothing more appearing, will not be set aside as fraudulent, at the suit of a creditor.
Faurote v. Carr, 123
2. *Same.*—*Pension Money.*—Money received by a debtor as a pension from the Federal government stands upon the same footing as any other money which he may have.
Id.
3. *Valid Between Parties.*—A fraudulent conveyance is valid between the parties.
Henry v. Stevens, 281
4. *Husband and Wife.*—*Divorce.*—*Alimony.*—Where a wife joins her husband in conveying the latter's land to a third person, in order to place it beyond the reach of an anticipated action against the husband, she can not, after obtaining a divorce, have the conveyance set aside and the land subjected to the payment of a judgment for alimony rendered in her favor.
Barrow v. Barrow, 345

GARNISHMENT.

See ATTORNEY AND CLIENT.

GRAVEL ROAD.

See INJUNCTION.

1. *Free.—Assessment Committee.—Report.—Time of Filing.—Notice.—Dismissal of Petition.*—As the statute relating to the establishment of free gravel roads does not require the committee appointed to make assessments of benefits to report at a fixed time, but does provide that the county auditor shall give notice of the filing of such report, mere delay in filing it is not sufficient ground for dismissing the petition.
Osborn v. Sutton, 443
2. *Same.—Declaration of Jurisdiction.*—It is not necessary for the board of commissioners to enter a formal order declaring that it has jurisdiction, or that all jurisdictional facts have been shown. An order directing the establishment of the road, and appointing a committee to assess benefits, is a sufficient assertion of jurisdiction. *Ib.*
3. *Same.—Competency of Committeeman.—Objection to.—Waiver.*—An objection to the competency of a member of the assessment committee must be made either at the time the committee is appointed, or within a reasonable time after the incompetency becomes known, or it will be deemed waived. *Ib.*
4. *Same.—Sufficiency of Petition.—Delay in Questioning.*—It is too late to object that there is not a sufficient number of qualified petitioners, after the report of the viewers has been approved and the assessment committee appointed. *Ib.*
5. *Same.—Vacancy in Assessment Committee.—How Filled.*—The board of commissioners have power to fill any vacancy that may occur in the assessment committee. *Ib.*
6. *Same.—Indebtedness of County.—Statutory Limit.—Bonds.—Plea in Abatement.*—A remonstrance on the ground that the county is indebted beyond the limit allowed by the statute, and has therefore no power to issue bonds to pay for the proposed gravel road, is insufficient unless it is affirmatively made to appear that bonds are likely to be issued in violation of the law. *Ib.*
7. *Same.—Locating Road on Land Appropriated for Public Ditch.—Remonstrance.*—A cause of remonstrance by land-owners affected by the proposed road, that it is located for a certain distance on land previously appropriated for a public ditch, is not, without more, sufficient. *Ib.*
8. *Same.—Questions on Appeal.*—No question can be raised on appeal that is not presented to the board of commissioners. *Ib.*
9. *Free.—County Commissioners.—Final Order.*—The final order by the board of commissioners, in a proceeding under the statute for the establishment of a free gravel road, is the order confirming the assessments of benefits made by the committee appointed for that purpose.
Neptune v. Taylor, 459
10. *Same.—Appeal.—When Will Not Lie.*—An appeal will not lie in such a proceeding, from an order of the board rejecting a motion, made before the confirmation of the assessments, to vacate the orders approving the viewers' report and directing the improvement to be made. *Ib.*

GUARANTY.

See CONTRACT, 12 to 14.

GUARDIAN AND WARD.

See INSANITY.

Sale of Real Estate.—Mistake.—Widow.—Second Coverture.—Descent.—Forced

Heirs.—Judgment.—Estoppel.—In 1865, G. died intestate the owner of the real estate in controversy, leaving a widow and six children. The widow subsequently married and died in wedlock in 1884, but in 1873, as the guardian of four of the children of her deceased husband, she petitioned for the sale of the interest of her wards in the land, describing it as the undivided four-ninths part, and an order of sale was granted. At the same term, she filed a second petition, averring a mistake in the previous description, and alleging that the wards' interest was an undivided four-sixths part, subject to her life-estate. The former order of sale was revoked and the undivided four-sixths was directed to be sold subject to the guardian's life-estate. A sale was duly made and confirmed under the last order, and a deed executed to the purchaser.

Held, that the judgment was only conclusive as to existing titles.

Held, also, that as the only absolute interest possessed by the wards at the time of the sale was such as they took as heirs of their father, the purchaser acquired only an undivided four-ninths part, and that the interest which afterwards accrued to them on the death of their mother, as her forced heirs, did not pass. *Erwin v. Garner, 488*

HARMLESS ERROR.

See INSTRUCTIONS TO JURY, 1, 2; INTERROGATORIES TO JURY; PRACTICE, 2, 7; SPECIAL FINDING, 4; SUPREME COURT, 1.

HIGHWAY.

See GRAVEL ROAD; INJUNCTION.

1. *Public Utility.—Question for Jury.—Conflicting Evidence.—Supreme Court.*—The question as to the public utility of a proposed highway is one of fact, and where the evidence is conflicting the verdict of the jury will not be disturbed on appeal. *Kyle v. Miller, 90*
2. *Same.—Damages.—Instructions.*—The question of the amount of damages sustained by a land-owner is one for the jury under proper instructions, and where the evidence is conflicting their verdict will not be disturbed on appeal, unless they have been erroneously instructed. *Ib.*
3. *Same.—Evidence as to Different Line.*—In highway cases it is not error to exclude evidence tending to prove a line of highway different from that proposed to be opened, and not affecting its utility. *Ib.*
4. *Report of Viewers Against Utility.—No Appeal from Order Confirming.*—An appeal will not lie to the circuit court from an order of the board of county commissioners confirming the report of the first viewers that a proposed highway will not be of public utility. *McKee v. Gould, 107*
5. *Same.—Remedy.—Second Petition.*—The remedy of the petitioners when an adverse report is made upon the subject of the utility of a highway is to file a bond for costs and petition over. *Ib.*

HUSBAND AND WIFE.

See EXECUTION; FRAUDULENT CONVEYANCE, 1, 4; MARRIED WOMAN; MORTGAGE, 2, 6; VENDOR AND PURCHASER, 1, 2; WILL, 6.

Fraudulent Conveyance.—Preference of Wife as Creditor.—A husband may prefer his wife as a creditor by conveying to her real estate in payment of his indebtedness to her, and such preference will be upheld, if untainted with fraud. *Hoes v. Boyer, 494*

INDICTMENT.

See CRIMINAL LAW.

INFANT.

See BASTARDY; CITY, 11 to 14; GUARDIAN AND WARD.

1. *Contract.—Voidable.*—The contract of an infant for the purchase of personal property not a necessary is voidable, not void. *Rice v. Boyer, 472*
2. *Same.—Disaffirmance During Non-Age.*—An infant may repudiate a contract respecting personal property during non-age. *Ib.*
3. *Same.—Disaffirmance Avoids. Ab Initio.*—The disaffirmance of a voidable contract of an infant avoids it *ab initio*, and it ceases to be effective for any purpose.. *Ib.*
4. *Same.—False Representation of Age.—Fraud.—Action Ex Delicto Will Lie Against Infant.*—An action will lie against an infant, who has obtained property on the faith of a false and fraudulent representation that he is of full age, for the loss actually sustained by a party who dealt with him in good faith and in the exercise of reasonable diligence, where a recovery can be had without giving effect to the contract. *Ib.*
5. *Same.—When Action May be Brought.*—In such a case, the action may be brought when the contract is repudiated, although the time for performance has not expired. *Ib.*

INFORMATION.

See CRIMINAL LAW.

INJUNCTION.

1. *Turnpike Company.—Possession of Public Highway.—Consent of County Commissioners.—Pleading.—Presumption.*—It will be presumed, in a suit to enjoin a gravel road company from exercising corporate franchises over a public highway, of which, it is alleged, it has taken possession, that its possession is with the consent of the county commissioners, and legal, unless there is an averment to the contrary. *Pulmer v. Logansport, etc., G. R. Co., 157*
2. *Same.—Exercise of Corporate Franchises.—Right of Land-Owner to Sue.—Complaint.—Remedy.*—A complaint by a land-owner through whose property a public highway passes, charging the defendant, a gravel road company, with unlawfully taking possession of such highway and exercising corporate franchises thereon, does not show a right of action in the plaintiff for relief by injunction or otherwise. *Ib.*

INSANITY.

See DEED, 9.

1. *Guardianship.—Capacity to Manage Estate.—Instructions.*—For a consideration of instructions to the jury upon the hearing of a proceeding to have a person adjudged of unsound mind and incapable of managing his estate, see opinion. *McCammon v. Cunningham, 545.*
2. *Same.—Meaning of Words "of Unsound Mind."*—The words "of unsound mind," as used in the statute, include every species of insanity or mental unsoundness. *Ib.*
3. *Same.—When Guardian May be Appointed.*—The jurisdiction to appoint a guardian is not confined to cases of insanity, idiocy or lunacy, strictly so called, but extends to every case of mental unsoundness or imbecility, when it is clearly made to appear of such a degree as to render its subject incapable of conducting the ordinary affairs of life. *Ib.*

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 22; HIGHWAY, 2; INSANITY, 1.

1. *Supreme Court.—Harmless Error.*—A judgment will not be reversed on account of an erroneous instruction, where it affirmatively appears that such instruction did not influence the verdict. *Porter v. Wallis, 40*

2. *Harmless Error*.—A judgment will not be reversed on account of an erroneous instruction which is harmless. *Andis v. Personett*, 202
3. *Memorandum of Exception to.—Signing by Judge.—Filing*.—Under sections 533 and 535, R. S. 1881, to make instructions given or refused a part of the record, the words "given and excepted to," or "refused and excepted to," must be written on the margin or at the close of each instruction, which memorandum must be signed by the judge, and dated, and the instructions filed. *Childress v. Callender*, 394
4. Where part of an instruction asked is incorrect, the whole should be refused. *McCammon v. Cunningham*, 545
5. *How Considered.—Inaccurate Statements*.—An instruction must be considered as a whole and in connection with the other instructions given, and if, when thus considered, the law is correctly stated, there is no available error in the fact that it contains some inaccurate statements. *Louisville, etc., R. W. Co. v. Jones*, 551
6. *Same.—Repetition of Proposition*.—When a rule of law applicable to the case is given in one instruction, it is not necessary to repeat it in another. *Ib.*

INSURANCE.

See CORPORATION.

1. *Proof of Loss.—Conditions Precedent.—Performance.—Waiver.—Pleading*.—Where a policy of insurance stipulates that the assured shall, as soon after a loss as possible, render a statement, under oath, concerning the origin and circumstances of the fire, stating the interest of the assured or others in the property, with its value, and that the insurance shall not be due or payable until sixty days after proof of loss, such stipulations are conditions precedent to a right of recovery, and the complaint, in an action on the policy, must affirmatively show a performance or waiver of the conditions. *Indiana Ins. Co. v. Capehart*, 270
2. *Same.—Evidence.—Power of Adjuster to Waive Preliminary Proof of Loss*.—Evidence that, in pursuance of a stipulation in the policy to that effect, the assured submitted to an examination under oath, at the request of the company, and was then notified by the agent, who had authority to make the examination and to adjust losses, that nothing further would be required, sufficiently establishes the authority of the agent to waive the other preliminary proof of loss required by the policy. *Ib.*
3. *Same.—Stipulation Against Waiver by Agent*.—In such case, a stipulation in the policy, that "no agent has power to waive any condition of this contract unless by written endorsement thereon," refers to conditions essential to make the contract obligatory and binding between the parties in the first instance, and to its continuing force and obligation until a loss occurs, and does not refer to stipulations requiring the assured to make proof of loss in a specified manner. *Ib.*
4. *Foreign Company.—Notice to Agent in Notice to Company*.—Notice to the resident agent of a foreign insurance company, in relation to any business of insurance transacted by him for the latter, is notice to the company. *North British, etc., Ins. Co. v. Crutchfield*, 518
5. *Same.—Condition in Policy for Notice to Company.—Sufficient Compliance With*.—Where a condition of the policy requires that the assured shall give notice and also render a particular account of his loss to the company the giving of such notice and the rendering of such account, or a tender of the same to an authorized agent of the company, constitute a sufficient compliance with the condition. *Ib.*
6. *Same.—Condition that Procurer of Insurance Shall be Agent of Assured.—When Void*.—A condition in a policy of insurance, "that any person,

other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in this policy, and not of this company," is void as applied to a person, i. e., a local agent, upon whose counter-signature the validity of the policy, by its terms, is made to depend. It is doubtful whether such a condition, under any circumstances, can be made available as a defence for the company after a loss has happened. *Id.*

INTEREST.

See TAXES, 3.

INTERPRETER.

See CRIMINAL LAW, 7 to 10.

INTERROGATORIES TO JURY.

See NEGLIGENCE, 3.

Striking Out.—Harmless Error.—It is a harmless error to refuse to strike out interrogatories to the jury, where the answers thereto are immaterial.

Porter v. Waltz, 40

INTOXICATING LIQUOR.

See JUROR.

JEOPARDY.

See TAXES, 7.

JUDGMENT.

See APPEAL; DEED, 4; DRAINAGE, 8; GUARDIAN AND WARD; PRACTICE, 3; REPLEVIN, 2, 6 to 8; SHERIFF'S SALE; SPECIAL FINDING, 1, 2, 4, 5; VENDOR AND PURCHASER, 1 to 3.

1. *Acceptance of Benefits Under Judgment Precludes Appeal.*—A party can not accept the benefit of adjudication and yet allege it to be erroneous.

Sterne v. Vert, 232

2. *Title.—Equity.—Modification.*—If all the persons interested in land are before the court, whether parties originally or brought in by cross complaint, the court may settle and adjudicate all conflicting titles and equities; and if those so brought in are not satisfied with the decree, but make no motion to modify, they can not question it for the first time in the Supreme Court.

Quill v. Gallivan, 235

3. *Not Rendered in Sixty Days After Trial.*—The fact that the court did not make its finding within sixty days after the conclusion of the trial, does not prejudice the rights of the parties.

Id.

4. *Lien Can Not be Created by Agreement.—Prior Equities.*—A judgment is purely a statutory lien. It can not be made a lien, so as to be enforced by execution, by the mere agreement of the parties, nor can it prevail as against prior equities.

Wells v. Benton, 585

JUDICIAL SALE.

See APPEAL, 2; EXECUTION; MORTGAGE, 4, 6; SHERIFF'S SALE; VENDOR AND PURCHASER, 1.

JURISDICTION.

See DRAINAGE, 3; GRAVEL ROAD, 2; POOR, 1; TRIAL.

Failure to Enter Order Continuing Cause.—Where jurisdiction is once acquired, it is not lost by the omission to enter orders continuing the cause.

Osborn v. Sutton, 443

JUROR.

See CRIMINAL LAW, 15.

Bias.—Incompetency.—Intoxicating Liquor.—Criminal Law.—One who, upon the examination touching his qualifications to serve as a juror, in

a prosecution for unlawfully selling intoxicating liquor, admits that he would allow less weight and credit to the testimony of the defendant, if he should testify in his own behalf, than he would if such defendant were not engaged in the business of selling liquor, is incompetent. *Stoots v. State, 415*

JURY.

See INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JUROR; NEW TRIAL, 7; TRIAL.

JUSTICE OF PEACE.

See BASTARDY.

LANDLORD AND TENANT.

1. *Lease by Testator.—Life-Estate Taken Subject to.—When Rents go to Reversioner and not to Life Tenant's Administrator.*—Where one takes by devise a life-estate in land, subject to an existing lease which was made by the testator, and dies during the term of the lessee, before any rent becomes due, no part of the rent for the term is payable to his administrator, but the same goes to the reversioner.

Watson v. Penn, 21

2. *Same.—Bequest of Personal Property.—Accounts.*—A bequest of all the testator's personal property, including notes and accounts, does not entitle the administrator of the life tenant to receive rents which become due after the death of his decedent. *Ib.*

3. *Same.—Definition of Account.*—The term *account* has no clearly defined legal meaning, but its primary idea is some matter of debt, or a demand in the nature of a debt, arising out of contract, and does not include rents until they have accrued. *Ib.*

4. *Same.—Time of Payment of Rents.—Usage.*—Where there is no time stipulated for the payment of rent for land which is leased for the term of one year, and no such usage as that an agreement to the contrary may be implied, payment is to be made at the end of the year. *Ib.*

5. *Lease.—Execution of Note for Rent.—Condition Precedent to Right of Possession.*—"Good and Approved Freehold Surety," *Meaning of.*—A farm lease, executed in August, stipulated that the lessee was to have immediate possession for the purpose of sowing wheat, and full possession of the whole farm on December 25th, the lessor in the meantime to make certain repairs. The lessee was to execute his note, due at the end of the term, for the amount of the rent, bearing interest from December 25th, "with good and approved freehold surety." Action begun October 1st by the lessee to recover damages for a breach of the lease.

Held, that the execution of the note was not a condition precedent to a partial possession for wheat sowing, but only a condition precedent to full possession, and, it having been executed prior to the filing of the complaint, no rights of the lessee were forfeited.

Held, also, that the provision for "good and approved freehold surety" did not give the lessor the right to arbitrarily reject any note tendered, but it should be construed to mean "good freehold surety worthy of approval." *Andis v. Personett, 202*

6. *Rent.—Demise by Life Tenant.—Death During Term.*—Where a lessor, who is a life tenant of the land demised, dies before the lease has expired, his representative may recover rent which had accrued prior to his death. *Henry v. Stevens, 231*

LARCENY.

See CRIMINAL LAW, 13, 16.

LEASE.

See LANDLORD AND TENANT.

LETTERS PATENT.

See PATENT RIGHT.

LIEN.

See DECEDENTS' ESTATES, 5; JUDGMENT; MARRIED WOMAN; MORTGAGE; TAXES.

LIMITATION OF ACTIONS.

See ACTION; CRIMINAL LAW, 4; MORTGAGE, 7; STATUTE OF LIMITATIONS.

MALICIOUS PROSECUTION.

1. *Evidence.—Reputation for Peace and Quietude.*—In an action for malicious prosecution it is error to admit, as evidence in chief for the plaintiff, testimony that at the time of an encounter between the parties, out of which the prosecution grew, the defendant was a man of bad reputation for peace and quietude. *Walker v. Pittman, 341*
2. *Same.—Damages.—Attorney's Fees.*—In an action for malicious prosecution the plaintiff is entitled to prove the value of the services of his attorney in defending the prosecution, without showing actual payment thereof. *Ib.*

MANDAMUS.

See SCHOOLS.

MARRIED WOMAN.

See GUARDIAN AND WARD; MORTGAGE, 2, 3, 6.

1. *Estoppel.*—Under the law of this State, a married woman is bound by an estoppel *in pais* like any other person, and this extends to the conveyance of land, either by deed or mortgage. *Ward v. Berkshire L. Ins. Co., 301*
2. *Same.—Mortgage.—Representation that Loan is for Her Use.—When Binding.—Suretyship.*—A married woman who makes a representation by affidavit, which is in good faith relied on and believed to be true, that a loan is for her own use and benefit, is estopped, in a suit to foreclose a mortgage executed upon her lands to secure the loan, to deny the truth of such representation, by asserting that the mortgage was given as a security for the debt of her husband. *Ib.*
3. *Same.—Fraud.*—There can be no estoppel where there is no fraud, but there may be fraud although there was no preconceived design to mislead or deceive. It may consist in the denial of what has been previously affirmed. *Ib.*
4. *Same.—Check for Amount of Loan.—Payee Immaterial.*—It is immaterial to whom the check for money loaned was made payable, for if the loan was made to the wife the mortgage is valid. *Ib.*
5. *Mortgage.—Complaint to Enforce.—Necessary Averments.—Power to Contract.*—Where it appears on the face of a complaint seeking to enforce a mortgage, that the latter was executed by a married woman and upon her separate property, it is necessary that it should be alleged that the debt which the mortgage was given to secure was contracted by her, and that it inured either to the benefit of herself or her estate, in order to show that the contract was one which she had power to make. *Jouchert v. Johnson, 436*
6. *Same.—Acceptance by Mortgagee of Husband's Note.—Showing that Debt was Contracted by and for Benefit of Wife.*—Where a mortgage is executed by a husband and wife upon the latter's land to secure the payment of a commercial note executed concurrently with it by the husband

alone, the mortgagee is not concluded by the acceptance of such note of the husband from showing that the debt evidenced by it was contracted by and for the benefit of the wife. *Ib.*

7. *Attorney's Fees.—Lien.—Quære*, as to the power to declare an encumbrance against the land of a married woman for attorney's fees for services relating to such property. *Sprague v. Prichard, 491*

MASTER AND SERVANT.

1. *Railroad.—Personal Injury.—Negligence of Fellow Servant.—Knowledge of Negligent Habits.—Complaint Against Master.*—A complaint by a servant against a master, to recover for an injury caused by the negligence of a fellow servant, to be good on demurrer for want of facts, must not only allege that the master knew that the fellow servant was negligent in the discharge of his duties, but it must also show that the plaintiff had no knowledge of that fact when he entered the master's service, and the failure to make the latter allegation is not cured by an averment that the plaintiff was "wholly unacquainted" with the fellow servant when he took the employment.
Lake Shore, etc., R. W. Co. v. Stupak, 1
2. *Same.—Remaining in Master's Service with Knowledge of Fellow Servant's Negligence.*—Where a servant remains in the master's service after he knows, or from circumstances ought to have known, of the negligent habits of a fellow servant, it is necessary, in a complaint by him against the master to recover for an injury caused by the negligence of the fellow servant, to show a reasonable excuse for remaining in the service after such knowledge. *Ib.*
3. *Negligence.—Defective Appliances.—Injury of Servant.—Liability of Master.*—An employer who takes personal supervision of work, and provides defective or insufficient structures or appliances to be used in its accomplishment, is liable to an employee who, without fault on his part, sustains an injury by reason of the defective instrumentalities.
Bradbury v. Goodwin, 286
4. *Same.—Right of Servant to Rely on Safety of Appliances.*—One employed in a hazardous undertaking, over which the employer exercises personal supervision, has the right to rely on the safety and sufficiency of the instrumentalities provided for the accomplishment of the work, unless their defectiveness is so glaring as to be open to the observation of prudent men. *Ib.*
5. *Same.*—The defendant, desiring to move a heavy iron safe from his office in the second story of a building to another building, constructed an anchorage of framework at the head of the stairway leading to the street, to which ropes and pulleys were attached, to control the descent of the safe. Afterwards the plaintiff was called in and directed by the defendant to take a position in front of the safe, to assist in lowering it. The framework gave way and the plaintiff was injured.
Held, that he can recover. *Ib.*

MEASURE OF DAMAGES.

See NEGLIGENCE, 8; SALE, 4.

MISTAKE.

See COUNTY COMMISSIONERS; DEED, 3, 5, 6; GUARDIAN AND WARD; MORTGAGE, 1; REAL ESTATE, ACTION TO RECOVER, 3; VENDOR AND PURCHASER, 1; WILL, 11, 12.

MORTGAGE.

See APPEAL, 2; CONTRACT, 2; MARRIED WOMAN, 1 to 6; VENDOR AND PURCHASER, 4.

1. *Mistake.—Reformation.—Foreclosure.*—Where a mistake in the description of mortgaged land is carried into the decree of foreclosure, it may be corrected by reforming and reforeclosing the mortgage.
McCasland v. Atna L. Ins. Co., 130
2. *Married Woman.—Land Held in Virtue of Previous Marriage.—Mortgage During Second Coverture Void.—Descent.*—A mortgage executed by a married woman during a second coverture, her husband joining, upon land held by her in virtue of a previous marriage, there being living children by the former marriage, is void under section 2484, R. S. 1881.
Atna Life Ins. Co. v. Buck, 174
3. *Same.—Subrogation.—Satisfied Mortgage.—Taxes.—Voluntary Payment.*—In such case, the mortgagee is not entitled to be subrogated to a valid mortgage which was paid off and satisfied, long before his mortgage was executed, with the proceeds of an intervening invalid mortgage, nor to the lien of the State for taxes voluntarily paid.
Id.
4. *Foreclosure.—Procuring Sale Under, Bars Appeal from Decree.*—Where, in a suit to foreclose a mortgage covering different tracts of land, a decree is given that the mortgage is invalid as to one tract but a valid lien upon the others, and the plaintiff procures a sale to be made thereunder of the latter, and buys in those tracts, he can not afterwards appeal from the decree, alleging it to be erroneous.
Sterne v. Vert, 232
5. *By Joint Purchasers of Real Estate.—Sale of Interest by One Purchaser.—Assumption of Debt by Grantee.—Principal and Surety.—Partition.*—Where two persons unite in the purchase of real estate, and execute their joint notes and mortgage for the unpaid purchase-money, and, after partition between themselves, one sells the part taken by him to a third person, who assumes the payment of his portion of the mortgage debt, such third person—the other purchaser having paid his equitable share of the debt—is primarily liable as principal debtor, and the land received by him must be first looked to before that held by the other, the latter standing as surety.
Higham v. Harris, 246
6. *Married Woman.—Land Held in Virtue of Previous Marriage.—Mortgage During Second Coverture Void.—Descent.—Sheriff's Sale.*—Under section 2484, R. S. 1881, a mortgage executed by a woman and her second husband upon land which descended to her as the widow of her first husband, who left children surviving him, is void and creates no lien upon such land, and a purchaser under foreclosure proceedings takes no title.
McCullough v. Davis, 292
7. *Promise to Pay Debt.—Effect as Security.—Statute of Limitations.*—Except as it is affected by the statute of limitations, a mortgage has the same force and effect as a security for a debt, whether it contains an express promise to pay written therein or not.
Jouchert v. Johnson, 436
8. *Foreclosure.—Complaint.—Description of Interests of Defendants.*—It is not necessary, in a complaint for the foreclosure of a mortgage, to specifically describe the interest which each defendant has, or may claim to have, in the real estate covered by the mortgage.
Hoes v. Boyer, 494
9. *Same.—Recording.—Averments as to.—Subsequent Purchasers.—Notice.*—Where it is shown by a complaint to foreclose a mortgage that any of the defendants are subsequent purchasers, it must be alleged that they purchased with actual notice of the mortgage, or that it was recorded within the time fixed by the statute, or before the sale and conveyance of the mortgaged property; but where it does not appear from the allegations of the complaint that any of the defendants are subse-

quent purchasers, it is not necessary to the sufficiency of the complaint that it should contain an averment that the mortgage has been recorded. *Ib.*

MOTION TO QUASH.

See CRIMINAL LAW; RAILROAD, 4.

MUNICIPAL CORPORATION.

See CITY; TOWN.

NEGLIGENCE.

See CITY, 1, 2, 11 to 14; MASTER AND SERVANT; PRINCIPAL AND SURETY; TELEGRAPH COMPANY.

1. *Railroad.—Defective Bridge.—Evidence.—Rate of Speed.—Res Gestæ.—Pleading.*—Where, in a complaint against a railroad company to recover for personal injuries sustained by the breaking down of a bridge, it is alleged that at the time of the accident it was wholly unsafe and dangerous to run a train over such bridge on account of its bad condition, by reason of its defective construction and the negligent manner in which repairs were being made, evidence as to the rate of speed at which the train was being run is admissible as part of the *res gestæ*.
Louisville, etc., R. W. Co. v. Pedigo, 481
2. *Same.—Breaking Down of Bridge While Being Repaired.—Presumption of Negligence.—Rebuttal.—Appliances for Making Repairs.—Degree of Care Required.*—Where a bridge, which is being repaired, breaks down while a train laden with passengers is passing over it, in an action by a passenger for an injury thereby sustained, it is not sufficient to rebut the presumption of negligence for the carrier to show that it was using the means and appliances ordinarily employed by prudent persons in making such repairs, without also showing that they are ordinarily sufficient, and that they were without known or discoverable defect, and were used with the utmost practical care and diligence. *Ib.*
3. *Same.—Interrogatories to Jury.*—It is not proper to submit to the jury interrogatories which merely call for an expression of opinion upon a question of law involved in the case, nor interrogatories the answers to which can have no influence on the general verdict. *Ib.*
4. *Complaint for Personal Injury.—General Averments of Negligence.*—A complaint to recover for personal injury is sufficient to withstand a demurrer, under the statutes of this State, when it characterizes the act which resulted in the injury as having been negligently or carelessly done, without alleging the specific facts constituting the negligence.
Louisville, etc., R. W. Co. v. Jones, 551
5. *Same.—Railroad.—Deraiment of Car.—Injury of Passenger.—Presumption of Negligence.—Rebutting Evidence.—Explanation as to How Accident Happened.*—Where a passenger is injured by reason of the car in which he is being carried becoming derailed, a presumption of negligence arises against the railroad company, which stands with the force of actual proof until overthrown by evidence that the accident was inevitable or unavoidable. The company is not required to explain how the accident happened. It is only necessary for it to show that it had employed the utmost skill and prudence practicable in its business, and that the cause of the accident could not reasonably have been discovered and guarded against. *Ib.*
6. *Same.—Evidence.—Objection to Question.—Conversation with Engineer of Wrecked Train Remote from Scene of Accident.—Practice.*—Where the trial court does not know from a question of a general character, calling for a conversation with the engineer of the train, at a station seven miles distant from the scene of the accident, whether the answer of the witness will or will not be competent evidence, it is not error

to overrule an objection to the question, based on the ground that the conversation "was irrelevant and immaterial and not connected with anything that occurred at the accident." If the answer is not competent, error may be predicated upon a refusal to strike it out. *Ib.*

7. *Same.—Speed of Train Prior to Accident.—Non-Expert Witness.*—Where negligence is charged in the running of a train at a high and dangerous rate of speed, it is competent for a non-expert witness, who saw the train one mile and a half from the place where the accident occurred, to state the rate of the speed at the point where his observation was made, at least in connection with the testimony of other witnesses that the speed had not been checked at the place where the accident occurred. *Ib.*
8. *Same.—Pre-Existing Disease.—Damages for Aggravation.*—Where, by reason of the negligent acts of another, a person suffering from a pre-existing disease sustains an aggravation of his malady, he may recover to the extent of the injury thereby caused. *Ib.*
9. *Same.—Rate of Speed.—Right of Railway Company to Regulate.*—In an action prosecuted by a passenger for an injury received by the derailment of a train running down grade, and around a curve, at a rapid rate of speed, an instruction asked that a railway company has the right to propel its trains at such a rate of speed as it sees fit, and that no rate of speed is negligence *per se*, should be refused. *Ib.*

NEW TRIAL.

See CRIMINAL LAW, 11, 15, 21, 25, 27; SPECIAL FINDING, 3; SUPREME COURT, 8, 11.

1. *As of Right.—Not Proper in Suit to Set Aside Fraudulent Conveyance.*—A new trial as of right is not allowable in an ordinary suit to set aside a fraudulent conveyance of land. *Warburton v. Crouch, 33*
2. *Same.—Judgment Resting on Paragraph to Set Aside.—New Trial not Proper.*—Where the record on appeal shows that the judgment rests on a paragraph of complaint to set aside a fraudulent conveyance of real estate, a new trial as of right can not be granted although there may be other paragraphs seeking to quiet title or recover possession. *Ib.*
3. *Same.—New Trial Proper in Suit to Revest Title to Land Obtained by Fraud.*—A new trial as of right is proper in a suit to revest title in an owner whose land has been obtained from him by fraud, and subsequently conveyed to a fraudulent grantee. *Ib.*
4. *Same.—Second Application within Statutory Period.*—The fact that the court erroneously denied a new trial as of right does not exhaust the power of the court to grant a second application within the statutory period. *Ib.*
5. *Affidavits.—Record.—Bill of Exceptions.*—Affidavits in support of a motion for a new trial can only be made part of the record by order of the court or bill of exceptions. *McConnell v. Huntington, 405*
6. *Excessive Damages.—Torts.*—The fourth statutory cause for a new trial, namely, "that the damages are excessive," is proper only in cases of *Lake Erie, etc., R. W. Co. v. Acres, 548*
7. *Same.*—When the action is in tort the verdict of the jury will not be disturbed on the ground of excessive damages, unless they are so outrageous as to strike every one with their enormity and injustice, and as to induce the belief that the jury must have acted from prejudice, partiality or corruption. *Ib.*

NOTICE.

See ACCOUNT, 2; ACTION; CITY, 7, 8, 11; DECEDENTS' ESTATES, 2; DRAIN-

AGE, 1 to 5, 7 to 11; ESTOPPEL; GRAVEL ROAD, 1; INSURANCE, 2 to 5; MORTGAGE, 9; PARTITION FENCE, 2; TOWN.

PARENT AND CHILD.

See CITY, 11 to 14; DEED, 1, 2.

PARTIES.

See COUNTY COMMISSIONERS; PROMISSORY NOTE, 5, 6; WITNESS, 3.

PARTITION.

See MORTGAGE, 5.

PARTITION FENCE.

1. *Agreement of Adjoining Owners to Maintain Distinct Portions.—Assessment of Damages.—Statute Construed.*—Under section 4848, R. S. 1881, it is competent for adjoining land-owners to agree that, instead of both maintaining the whole of the partition fence jointly, each shall maintain a distinct portion thereof, and in either event the statutory method for the assessment of damages against the party in default is applicable. *Bruner v. Palmer, 397*
2. *Same.—Notice.—Sufficiency of.*—A written notice to the owner in default that on a day and at an hour named the other owner will call upon two disinterested freeholders "to examine all of the partition fences between my land and your land in Daviess county, in the State of Indiana," and assess the amount necessary to make them sufficient, if they are deemed insufficient, is good under the statute. *Ib.*
3. *Same.—Evidence.—Assessment Admissible Though Not Signed.—Identification.*—The assessment made by the appraisers in such case, although not signed, is admissible in evidence after it has been properly identified. *Ib.*

PARTNERSHIP.

See CONTRACT, 5.

1. *Promissory Note.—Firm Note for Individual Debt.—Assumption of Payment by Firm.—Pleading.—Matter for Reply.*—Where, in an action upon a promissory note executed in the firm name of a partnership, it is answered by the administrator of one partner, that the other partner, a co-defendant, executed the note without the knowledge or consent of the decedent and for an individual debt, the plaintiff, if he relies upon an assumption of the payment of the debt by the firm, must reply the assumption. *Fordice v. Scribner, 85*
2. *Dissolution.—Assignment by One Partner of Chose in Action.—Authority.*—After the dissolution of a partnership, one partner can not assign or transfer a chose in action belonging to the firm, without special authority, either express or implied, from the other partner. *Stair v. Richardson, 429*

PATENT RIGHT.

See PROMISSORY NOTE, 9 to 13.

1. *Regulation of Sale by State.—Police Power.—Constitutional Law.*—The statute of this State requiring the vender of patent rights to file with the county clerk copies of the letters patent, and to make an affidavit that the letters are genuine and unrevoked, and that he has authority to sell, is a police regulation, and constitutional and valid. *New v. Walker, 365*
2. *Same.—Promissory Note.—Words Required to be Inserted in.*—The provision in such statute, that the words "given for a patent right" shall be inserted in any obligation taken from the vendee of a patent right, is also a police regulation, but, aside from that, it is valid as a regulation concerning promissory notes. *Ib.*

3. *Same.*—*Sale of Right to Use and Manufacture.*—*Interest Taken Under.*—The statute applies to a sale of the right to use and manufacture for sale and use, within a specified territory, the patented article, for such a sale is a grant of all the beneficial interest possessed by the patentee in such territory, and carries with it an interest in the patented right itself. *Ib.*

PAUPER.

See POOR.

PENALTIES.

See CRIMINAL LAW, 3, 12; TAXES; TELEGRAPH COMPANY.

PENSION.

See FRAUDULENT CONVEYANCE, 2.

PERJURY.

See CRIMINAL LAW, 18; TAXES, 15.

PERSONAL PROPERTY.

See SALE; TAXES, 1, 4 to 7, 11 to 15.

PERSON OF UNSOUND MIND.

See DEED, 9, 10; INSANITY.

PLEADING.

See CONTRACT, 4; CRIMINAL LAW; DEED, 2, 4, 8, 9; DRAINAGE, 2; INJUNCTION; MARRIED WOMAN, 5; MASTER AND SERVANT, 1; MORTGAGE, 8, 9; NEGLIGENCE, 1, 4; PARTNERSHIP, 1; PRACTICE; PRINCIPAL AND AGENT; PROMISSORY NOTE, 1, 6 to 8; REAL ESTATE, ACTION TO RECOVER, 1, 5; REPLEVIN, 1, 2, 7; SUPREME COURT, 1, 3, 6; TAXES, 4.

1. *Exhibit.*—An exhibit which is not the foundation of a pleading can not be looked to in aid thereof. *Huff v. City of Lafayette, 14*
2. *Reply to Several Paragraphs.*—*Demurrer.*—A reply which is not good as to all the paragraphs of answer to which it is addressed, is bad on demurrer. *Fordice v. Scribner, 85*
3. *Demurrer.*—*Amendment.*—*Filing New Paragraph.*—*Waiver of Exceptions.*—Where, upon the sustaining of a demurrer to his complaint, the plaintiff, without obtaining leave to amend, files what he styles another paragraph, setting up substantially the same facts as were contained in the original complaint, the new paragraph will be treated as an amended complaint, superseding that demurred out, and waiving exceptions to the rulings thereon. *Hunter v. Pfeiffer, 197*
4. *Averment that Demand is Due.*—*Implication of Law.*—Where, from the facts pleaded, the law implies that money sued for is due, a specific averment that it is due is not necessary. *Wagoner v. Wilson, 210*
5. *Same.*—An averment in a complaint to recover money loaned, that the defendant has "refused to pay the plaintiff though often requested so to do," is sufficient to show by inference that the indebtedness is due and unpaid. *Ib.*
6. *Same.*—*Money Had and Received.*—*Bill of Particulars.*—In an action for the recovery of money, where the complaint alleges that money was advanced to, and had and received by, the defendant from the plaintiff at or about a given time, no further bill of particulars is necessary, unless required by a motion to make the complaint more certain. *Ib.*
7. *Same.*—*Account.*—Where an indebtedness sued for is not evidenced by a written instrument, and is so described in the complaint as to indicate with certainty the items and dates of the account, an additional bill of particulars is not necessary. *Ib.*

8. *Appeal from Justice.—Unnecessary Reply.—Ruling on Demurrer to.—Reversible Error.*—Where, upon an appeal to the circuit court, the plaintiff elects to file a reply, and an erroneous ruling is made thereon injurious to the defendant, the judgment will be reversed although, under sections 1643 and 1502, R. S. 1881, the reply was not necessary.
Blacker v. Dunbar, 217
9. *Written Instrument.—Filing with Complaint.—Sufficient Showing on Appeal.*—Where the complaint alleges that a copy of the written instrument counted on "is herewith filed," and an instrument appears in the transcript, immediately following the complaint, corresponding with that alleged to have been filed, it sufficiently appears, on appeal, that the statute requiring written instruments or a copy to be filed with the complaint has been complied with.
Blackburn v. Crowder, 238
10. *Allegations of Title, General and Specific.*—A general allegation of title is controlled by the specific facts pleaded.
Hewry v. Stevens, 281
11. *Same.—Scope and Tenor.*—A pleading is to be judged from its general scope and tenor.
Ib.
12. *Supplemental Complaint.—Amended Complaint.—Practice.*—The office of a supplemental complaint is to show facts which have occurred since the filing of the original complaint. If the original complaint is bad, and at the time it was filed facts existed which, if properly pleaded, would have made it sufficient on demurrer, such facts must be brought into the case by an amended complaint, and not by supplemental complaint.
Simmons v. Lindley, 297
13. *Erroneous Ruling Upon Not Cured by Special Finding.*—Error in sustaining a demurrer to a good reply, to which ruling an exception is duly taken, can not be cured by the special finding.
New v. Walker, 365
14. *Complaint.—When Specific Averment of Essential Fact Not Necessary.*—A complaint is not bad on demurrer for the want of a specific averment of an essential fact, where such fact is plainly apparent from other facts pleaded.
Byard v. Harkrider, 376
15. *Same.—Surplusage.*—The averment of matter for which a recovery can not be had in the action as brought will not vitiate a complaint which states a good cause of action exclusive of such averment.
Ib.
16. *Demurrer.—Amendment.—Filing New Paragraph.—Waiver of Exception.*—Where, after a demurrer is sustained to a complaint, another pleading, styled a second paragraph of complaint, is filed, the latter will be treated as an amended complaint, and as waiving an exception to the ruling on the demurrer.
Jouchert v. Johnson, 436
17. *Demurrer.—Capacity to Sue.*—The cause for demurrer, that "the plaintiff has not legal capacity to sue," has reference only to some legal disability, such as infancy or insanity, and not to the fact that the complaint fails to show a right of action in the plaintiff.
Board, etc., v. Kimberlin, 449
18. *Complaint.—Demurrer.*—If a complaint states facts entitling the plaintiff to relief, it will repel a demurrer, although it may not entitle him to all the relief prayed.
Rice v. Boyer, 473
19. *Motion to Strike Out.—Practice.—Supreme Court.—Reversible Error.*—Where a motion to strike out part of a pleading is so framed that when the pleading is copied into the transcript the part to which the motion is addressed can not be identified, it presents no question on appeal; besides, the overruling of a motion to strike out surplusage is not a reversible error.
Sprague v. Pritchard, 491
20. *Exhibit.—Reference to in Subsequent Paragraphs.*—Where an exhibit is filed with a pleading, and properly designated, it may be referred to

in other paragraphs without specifically making it a part of each of them. *Hochstedler v. Hochstedler*, 506

POLICE REGULATION.

See PATENT RIGHT.

POOR.

See TOWNSHIP TRUSTEE.

1. *Jurisdiction.—Circuit Court.—Claim Against County for Supplies to Poor Persons.—Township Trustee.*—The circuit court has appellate jurisdiction of a claim against a county for supplies furnished to poor persons, on orders of a township trustee, where it has been presented to and disallowed by the county commissioners. *Board, etc., v. Harlem*, 164
2. *Relief of.—Discretion of Township Trustee.*—Under the provisions of the law of this State for the relief of the poor, the poor of each county and the transient poor shall receive all necessary relief at the expense of the proper county; and the nature and extent of such relief in each particular case is largely entrusted to the sound discretion and practical judgment of the township trustee as overseer of the poor. *Ib.*
3. *Same.—Permanent or Temporary Relief.*—Whether it will be better, in any case, to remove a resident poor person to the county asylum, as a permanent charge, or to afford him temporary relief merely, is a question for the determination of the township trustee. *Ib.*
4. *Same.—Evidence.—Orders of Trustee not Conclusive, but Admissible in Action Against County.*—The orders issued by a township trustee for supplies to poor persons are not conclusive upon him or the county, but they are admissible in evidence in support of a claim against the county by the person furnishing the supplies, where there is evidence *aliunde* that the supplies were furnished to the persons named in the orders, and that they were entitled to the relief. *Ib.*

PRACTICE.

- See APPEAL; ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW; DECEDENTS' ESTATES, 2; DEMURRER TO EVIDENCE; DRAINAGE; EVIDENCE, 5, 6; GRAVEL ROAD; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JUDGMENT, 2; NEGLIGENCE, 6; NEW TRIAL; PLEADING; SPECIAL FINDING; SUPREME COURT; WITNESS, 1.
1. *Remedies.—Appeal.—Collateral Attack.*—Informalities and irregularities must be corrected by appeal. They can not be taken advantage of in a collateral attack. *Huff v. City of Lafayette*, 14
 2. *Striking Out Evidence.—Harmless Error.*—Where a party is not injured by the striking out of evidence, the ruling, even if erroneous, is not available for the reversal of a judgment. *Wasson v. Hodshire*, 26
 3. *Bill of Exceptions.—Judgment.*—Objections to a judgment, not exhibited by a bill of exceptions, are unavailing. *Quill v. Gallivan*, 235
 4. *Evidence.—Objection to Admission of Must be Specific.*—An objection to the admission of evidence, that it is "irrelevant, incompetent and immaterial," is too indefinite and uncertain to present any question on appeal. *McCullough v. Davis*, 292
 5. *Same.—Destroyed Records.—Latitude Allowable in Admission of Parol Evidence.*—Much latitude is allowable in the admission of parol evidence to supply what has been lost by the destruction of papers and records. *Ib.*
 6. *Evidence.—Objections to Admission of.*—An objection to the admission of evidence, that it is "incompetent, immaterial and irrelevant," is too general to present any question. *Byard v. Harkrider*, 376
 7. *Pleading.—Evidence.—Harmless Error.—Supreme Court.*—Where an error

is committed in sustaining a demurrer to a paragraph of complaint, in order to prevent a reversal it must affirmatively appear that there was another paragraph under which the same facts might have been proved, and that the error was therefore harmless.

Jouchert v. Johnson, 436

8. *Objections Must be Specific.*—Objections must be specifically stated, or they will not be considered. *Osborn v. Sutton*, 443

9. *Theory of Case.*—*Supreme Court.*—The theory upon which a case proceeds in the trial court will prevail in the Supreme Court.

Lake Erie, etc., R. W. Co. v. Acres, 548

10. *Evidence.*—*Objections to Admission Must be Specific.*—*Supreme Court.*—A general objection to the admission of evidence, stating no reason why it should be excluded, presents no question on appeal.

Louisville, etc., R. W. Co. v. Jones, 551

PREFERENCE OF CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKS AND BANKING; HUSBAND AND WIFE.

PRESUMPTION.

See CITY, 5; DEED, 9; DEMURRER TO EVIDENCE, 2; INJUNCTION, 1; NEGLIGENCE, 2, 5; SHERIFF'S SALE, 4.

PRINCIPAL AND AGENT.

See AGENCY; ATTORNEY AND CLIENT; CONTRACT, 13, 14; CORPORATION; INSURANCE, 2 to 6; TRUST AND TRUSTEE.

Attorney and Client.—*Pleading.*—*Complaint.*—*Demand.*—*Decedent's Estate.*—

A complaint against an agent or attorney, to recover money alleged to be in his hands, which fails to aver a demand by the principal, and a refusal by the agent or attorney, prior to the bringing of the action, is bad, even where the latter is joined as a defendant in a claim against a decedent's estate.

Claypool v. Gish, 424

PRINCIPAL AND SURETY.

See MARRIED WOMAN, 2 to 6; MORTGAGE, 5; PROMISSORY NOTE, 1 to 3.

Negligence of Creditor in Collection of Debt.—*Release of Surety.*—Any affirmative act of the creditor, such as the release or fraudulent surrender of a collateral security, whereby an indemnity of which the surety might avail himself is lost to him, discharges the surety *pro tanto*; but mere passive negligence of the creditor in the collection of his debt, either from the principal debtor or from collateral securities held by him, does not discharge the surety.

Wasson v. Hodshire, 26

PROMISSORY NOTE.

See BASTARDY; LANDLORD AND TENANT, 5; MARRIED WOMAN, 6; PARTNERSHIP; PATENT RIGHT, 2; SALE, 4 to 6.

1. *Cross Complaint by Surety.*—*Exhibit.*—Where, in an action against the makers of a promissory note, one of the defendants files a cross complaint against his co-defendants, averring generally that he executed the note merely as surety for the other makers, the note is not the foundation of his action and need not be made an exhibit.

Porter v. Waltz, 40

2. *Same.*—*Relation of Makers to Each Other.*—*Form of Signing Note.*—*Evidence.*—The form in which one of the makers of a promissory note signs the instrument, is only *prima facie* evidence of the relation which exists between him and the other makers. *Id.*

3. *Indorsement by Payee.*—*Qualification by Parol.*—*Indorsement to Evidence Payment.*—In an action by the holder of a promissory note against

the payee on his indorsement thereof, the latter may show by parol that when he put his name upon the back of the note it had already been paid, and that his name was written thereon at the request of the plaintiff as evidence of payment. *Spencer v. Sloan, 183*

4. *Same.—Collateral Security for Previous Debt.—Consideration.*—An existing previous debt constitutes a sufficient consideration for the pledge of collateral paper as security for its payment. *Ib.*
5. *Action on.—Party in Interest.—Estoppel.*—The maker of a promissory note is estopped from denying that the payee is the real party in interest. *Blacker v. Dunbar, 217*
6. *Same.—Meritorious Defence.—Answer of.—Demurrer.*—An answer to a complaint on a non-negotiable note, that the plaintiff is not the real party in interest, and that if the action were brought by the proper person, the defendant had a good defence thereto, but not stating what the defence is, nor why he can not avail himself of it in the action as brought, is bad on demurrer. *Ib.*
7. *Same.—Payment to Protect Title.—Set-Off.*—An answer alleging that the note in suit was given for real estate inherited by the payee's wife, and that the defendant, in order to protect his title, had been compelled to pay said wife's portion of the debts of the ancestor which his personality had failed to pay, in a sum equal to the amount due on the note, but failing to allege that the land had been conveyed to him by deed with covenants of warranty, or that the payment had been made at the request of the plaintiff or his wife, or that either of them had promised to repay the amount, or to give him credit on the note therefor, is bad both as a plea in bar and as an answer by way of set-off. *Ib.*
8. *Same.—Contract.—Consideration.—Admissions in Pleadings.*—Where the plaintiff in his reply admits the contract counted on in the answer, he thereby admits the stated consideration therefor, and, if it is sufficient, he can not claim that the contract is without consideration, or that it should be supported by any other or different one. *Ib.*
9. *Patent Right.—Sale.—Non-Compliance with Statute.—Notice of Consideration.*—A promissory note, taken by the vender of a patent right who has not complied with the statute, which does not contain the words "given for a patent right," is inoperative as between the parties and as to one who buys with notice that it was given for such right, unless the latter affirmatively shows that his endorser was a good-faith purchaser. *New v. Walker, 365*
10. *Same.—Inquiry.*—Knowledge that a note, which does not contain the words required by the statute, was given for a patent right, puts a purchaser upon inquiry as to whether the vender of the right had complied with the law regulating sales thereof. *Ib.*
11. *Same.—Payable to Bearer.—Negotiability.*—A note payable to bearer is negotiable as commercial paper, if it possesses the other essential requisites of such instruments. *Ib.*
12. *Same.—Statute Declaring Void.—Illegal Consideration.*—Where a statute, in direct terms, declares void a promissory note when given for a vicious consideration, it is ineffective even in the hands of a good-faith holder. *Ib.*
13. *Same.—Innocent Holder.*—The statute regulating the sale of patent rights does not, either expressly or by necessary implication, declare void a note taken by a vender who has not complied with the law; and where a negotiable note is executed to such person, it is valid in the hands of an innocent holder. *Ib.*
14. *Account.—Assignment.—Denial Under Oath.—Burden of Proof.*—Where

the assignment of a note or account sued on is denied under oath by the defendant, the burden is on the plaintiff to show a sufficient assignment by a preponderance of the evidence. *Stair v. Richardson*, 429

PUBLIC POLICY.

See CONTRACT, 5.

QUIETING TITLE.

See DEED, 8, 9.

RAILROAD.

See MASTER AND SERVANT, 1, 2; NEGLIGENCE; TAXES, 8 to 10.

1. *Donation by City.—Resident Freeholders, How Enumerated.—Statute Construed.*—In ascertaining the number of resident freeholders so as to determine numerically whether a petition for a city to make a donation in city bonds, to aid in the construction of a railroad, is signed by a majority, as required by the statute, R. S. 1881, section 3153, all persons resident within the city, and owning a freehold interest in land, must be counted. *State, ex rel., v. Mayor, etc.*, 74
2. *Obstruction of Street.—City.—Action for Damages by Abutting Lot-Owner.—Pleading.*—An abutting lot-owner can not maintain an action against a railroad company for constructing and operating its railroad upon the street of a city, where the injuries complained of are such only as he sustains in common with the public generally; and a complaint which fails to allege special injury to the plaintiff, or that such use and occupation of the street are without leave of the city, is insufficient. *Terre Haute, etc., R. R. Co. v. Bissell*, 113
3. *Power to Acquire and Hold Real Estate.*—Railroad companies may acquire and hold land other than that occupied by their tracks. *Pfaff v. Terre Haute, etc., R. R. Co.*, 144
4. *Service of Summons.—Omission of Christian Name of Conductor not Ground for Quashing Sheriff's Return.*—Service on a railroad company is had in compliance with the statute, R. S. 1881, section 4027, when a copy of the summons is delivered to a conductor on any train on the road passing into or through the county. The omission of the Christian name of the conductor is not ground for quashing the sheriff's return. *Cincinnati, etc., R. R. Co. v. McDougall*, 179
5. *Same.—Name of Corporation.*—The designation of the defendant in the complaint as "The Cincinnati, Hamilton and Indianapolis Railroad Company," sufficiently indicates that the defendant is a corporation. *Ib.*
6. *Same.—Action for Stock Killed.—Liability of Corporation Owning Line.*—Under the statute, R. S. 1881, section 4025, a railroad corporation is liable for stock killed on its line at a point where it has failed to securely fence its track, whether the railroad is operated by the company owning the line, or by another. *Ib.*
7. *Same.—Evidence as to Corporation and Liability.*—Evidence that an animal was injured upon the track of a railway known as the Cincinnati, Hamilton and Indianapolis Railroad, a branch of the Cincinnati, Hamilton and Dayton Railroad, sufficiently indicates that the former is a corporation by that name, and presumptively liable for the injury. *Ib.*
8. *Refusal to Carry Passengers.—Action in Tort.*—The wrongful refusal or failure of a common carrier to carry passengers is a tort for which an action will lie. *Lake Erie, etc., R. W. Co. v. Acres*, 548
9. *Rate of Speed.—Right of Railway Company to Regulate.*—In an action prosecuted by a passenger for an injury received by the derailment of a train running down grade, and around a curve, at a rapid rate of

speed, an instruction asked that a railway company has the right to propel its trains at such a rate of speed as it sees fit, and that no rate of speed is negligence *per se*, should be refused.

Louisville, etc., R. W. Co. v. Jones, 551

REAL ESTATE.

See CITY, 1, 2, 4 to 8; DECEDENTS' ESTATES, 3 to 5; DEED; EVIDENCE, 1, 2; EXECUTION; FRAUDULENT CONVEYANCE; GUARDIAN AND WARD; HUSBAND AND WIFE; LANDLORD AND TENANT; MORTGAGE; NEW TRIAL, 1 to 3; PARTITION FENCE; RAILROAD, 2, 3; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE; TRUST AND TRUSTEE; VENDOR AND PURCHASER.

Possession of Grantor Not Adverse to Grantee.—The continued possession of a grantor can not be adverse to his grantee. *Henry v. Stevens, 281*

REAL ESTATE, ACTION TO RECOVER.

See DEED, 11, 13.

1. *General Denial.*—*Equitable Defence.*—*Evidence.*—In actions to recover possession of real estate, any facts which show that, according to the principles of equity, as applied by courts of chancery, the plaintiff ought not to recover, may be given in evidence under a statutory general denial. *East v. Peden, 92*
2. *Same.*—*Equitable Defence Defined.*—Any state of facts which will entitle the defendant to the reformation of an instrument, or which would, under the former practice, if set up in a bill for that purpose, invoke the aid of a court of chancery for relief against the claim or title put forward by the plaintiff, is an equitable defence. *Ib.*
3. *Same.*—*Equitable Title in Third Person.*—*Privity.*—*Deed.*—*Description.*—*Mistake.*—In an action to recover possession of real estate, the defendant can not defeat a recovery by showing that a third person, with whom he is not in privity, is the equitable owner of the land in controversy through a deed previously made by the plaintiff, by which it was intended to convey the same to him, but which, by mistake, did not describe the land, and under which the defendant asserts no claim. *Ib.*
4. *Same.*—*When Equity in Third Person is an Available Defence.*—The outstanding equity in a third person which is available to a defendant in possession, without title, against a legal title in the plaintiff, must be such an equity as the defendant would have the right, by making proper parties, to invoke the aid of a court of chancery to enforce in his favor. *Ib.*
5. *Right to Possession When Suit Brought.*—*Complaint.*—*Supplemental Complaint.*—In an action to recover real estate, a complaint, which fails to allege that the plaintiff was entitled to the possession at the time he commenced his suit, is insufficient on demurrer, and such defect is not cured by the filing of a supplemental complaint by the plaintiff's heirs, after his death, alleging that they are entitled to the immediate possession of such real estate. *Simmons v. Lindley, 297*

RECORDING WRITTEN INSTRUMENT.

See MORTGAGE, 9.

REFORMATION OF DEED.

See CONTRACT, 2; DEED, 1 to 6; MORTGAGE, 1.

REMEDIES.

See HIGHWAY, 5; INJUNCTION, 2; PRACTICE, 1; SALE, 4.

RENT.

See ACCOUNT, 1; LANDLORD AND TENANT.

REPEAL OF STATUTE.

See CITY, 10; CRIMINAL LAW, 2, 3; DRAINAGE, 12; TAXES, 13; TELEGRAPH COMPANY, 3, 5, 6.

REPLEVIN.

1. *Action on Bond.—Variance Between Exhibit and Complaint.—Demurrer.*—If, in an action upon a replevin bond, there is a variance between the recitals in the complaint and those in the copy of the bond filed with it, the latter will control, and the variance is not available on demurrer. *Blackburn v. Crowder, 238*
2. *Same.—Allegations that Judgment is in Force.—Matter of Defence.*—Where a complaint on a replevin bond alleges that the defendants have failed and refused to pay the judgment rendered in the replevin proceeding, it is not necessary to aver that it is in force and unappealed from. If it is not in force for any reason, that fact should be made to appear by answer. *Ib.*
3. *Bond.—Stranger Can Not Maintain Action on.*—An action can not be maintained upon a replevin bond by a person who was not a party to the replevin proceeding nor an obligee in the bond. *Pipher v. Johnson, 401*
4. *Authority of Person who Makes Seizure.—Sheriff's Return.—Evidence.—Action on Bond.*—Where the plaintiff in a replevin proceeding obtains possession of the property, neither he nor his sureties can, in an action on the bond, impeach the sheriff's return, or question the authority of the person who seized the property upon the writ and from whose hands he accepted it. *McFadden v. Ross, 512*
5. *Same.—Administrator.—Chattel Mortgage.—Mitigation of Damages.—Estoppel.*—Where an administrator has obtained possession of property by proceedings in replevin, he may show in mitigation of damages, in an action on the bond to recover the value of the property, that the estate of which he is administrator holds an unpaid chattel mortgage upon it, unless estopped by the adjudication in the replevin suit. *Ib.*
6. *Same.—Former Adjudication.—Question of Title.—Not Determined Unless Distinctly in Issue.*—The action of replevin is possessory in its character, and unless the title to property is distinctly put in issue, the judgment determines nothing beyond the right of possession. *Ib.*
7. *Same.—Pleadings.—Matter in Issue.*—Where the pleadings in a replevin suit show that no question of title was involved, a judgment assuming to settle the question of ownership is void. *Ib.*
8. *Same.—Collateral Inquiry.*—Where subjects are adjudicated which are not in issue, they may be inquired into collaterally, notwithstanding the judgment. *Ib.*

RES ADJUDICATA.

See DECEDENTS' ESTATES, 2; GUARDIAN AND WARD; REPLEVIN, 6 to 8.

RESCISSION.

See CONTRACT, 7 to 11; DEED, 8 to 10.

SALE.

See DECEDENTS' ESTATES, 3 to 5; EXECUTION; GUARDIAN AND WARD; MORTGAGE, 4, 5; PATENT RIGHT; PROMISSORY NOTE, 9 to 13; SHERIFF'S SALE; TAXES, 1 to 3; VENDOR AND PURCHASER.

1. *Personal Property.—Bill of Sale.—Evidence to Show that it is Only a Mortgage.*—In the enforcement of equitable rights, parol evidence may be

given to show that a bill of sale of personal property, absolute on its face, is in fact only a mortgage to secure the payment of a debt.

Seavey v. Walker, 78

2. *Same.—Fraud.—Evidence.*—Where the evidence as to whether a sale of personal property was bona fide or fraudulent is conflicting, the finding of the trial court will not be disturbed on appeal. *Id.*
3. *Same.—Change of Possession.—What not Sufficient.—Statute of Frauds.*—Where the vendor and his employee remain in actual possession of a stock of merchandise, the fact that the latter, under authority conferred by the purchaser, is in control of the goods, is a mere constructive change of possession, and the sale, under section 4911, R. S. 1881, is void as against creditors and subsequent purchasers. *Id.*
4. *Personal Property.—Refusal of Purchaser to Execute Notes as Agreed.—Remedy.—Measure of Damages.*—Where goods are sold upon credit, the purchaser agreeing to execute notes payable at a future day for the purchase-price, his refusal to do so entitles the seller to maintain an action for the refusal, and the measure of damages is the full price of the goods. *Carnahan v. Hughes*, 225
5. *Same.—Agency.—Authority to Bind Absent Person.—Contract.—Ratification.*—In order that one person by his agreement may bind another in the purchase of property in his absence, it must be shown either that the former had authority to make the contract, or that it was afterwards ratified by the latter upon a sufficient consideration. *Id.*
6. *Same.—Sale to Two Persons.—Agreement that Both Shall Execute Notes.—Acceptance of Notes Signed by One.—When Surrender of Necessary to Action Against Other.*—Where, upon a sale of goods to two persons, the seller receives and retains notes executed by one for the purchase-price, he can not maintain an action against the other for damages for refusing to sign the notes according to the contract of sale, without returning or offering to return the notes received, or showing an excuse for not doing so. *Id.*
7. *Consideration.*—One who assumes to transfer what the law prohibits him from transferring, unless he does certain acts, can not yield a valid consideration to the person with whom he deals. *Near v. Walker*, 365

SCHOOL FUND.

See TAXES, 5.

SCHOOLS.

See TAXES, 5.

Regulation of Studies.—Discretionary Power of School Authorities.—Suspension of Pupil.—Mandamus to Compel Readmission.—A rule, prescribed by the superintendent of the free graded schools of a city, with the sanction of the trustees, that the pupils in the high school department shall, at stated intervals, employ a certain period of time in the study and practice of music, for which purpose they shall provide themselves with a prescribed book, is an exercise of discretionary power conferred by law, and unless the regulation is shown to be unreasonable, or a satisfactory excuse for failing to comply therewith is given, mandamus will not lie to compel the school authorities to readmit a pupil who has been suspended for disobedience thereof. *State, ex rel., v. Webber*, 31

SEDUCTION.

See CRIMINAL LAW, 23.

SET-OFF.

See PROMISSORY NOTE, 7.

SEWER.

See CITY, 1 to 3.

SHERIFF'S RETURN.

See RAILROAD, 4; REPLEVIN, 4.

SHERIFF'S SALE.

See APPEAL, 2; EXECUTION; MORTGAGE, 4, 6; VENDOR AND PURCHASER, 1.

1. *Judgment.—Subsequent Purchasers of Different Parcels of Land Bound by.—Execution.—Order of Sale.*—Where a judgment is a lien upon several parcels of land which are afterwards sold by the judgment defendant to different persons and at different times, a court of equity will compel a sale of such lands, to satisfy the judgment, to be made in the inverse order of their alienation. *Richey v. Merritt, 347*
2. *Same.—Avoiding Sale.—Notice of Irregularities.*—An execution plaintiff, and the assignee of the judgment stands in that relation, is chargeable with notice of all irregularities in the issuance of the execution and in the sale of property under it, and when he becomes the purchaser the sale will be set aside for irregularities which could not be made effective as against an innocent third party, not so chargeable with notice. *Id.*
3. *Same.—Acquiescence.—Estoppel.*—Where a party has notice in time to prevent, by injunction or other proceeding, a sale of his land until parcels subsequently disposed of by the judgment defendant have been exhausted, but makes no objection until after the sale has been consummated, and shows no excuse for not doing so, he is estopped from asking to have the sale set aside on the ground that the proper priority was not observed. *Id.*
4. *Same.—Levy.—Presumption of Satisfaction of Judgment.—Voidable Alias Execution.—Waiver.—Estoppel.*—The levy of an execution upon property of sufficient value to pay the judgment, creates a presumption of the satisfaction of the judgment, and operates as such until the levy is legally disposed of, and an *alias* execution issued before such levy is disposed of is irregular and voidable, and may be set aside on motion made before the property is sold under it; but if the execution defendant waives his right to have such *alias* execution set aside, he can not afterwards question the validity of the sale on account of the irregular and voidable character of the execution. *Id.*

SHORT-HAND REPORTER.

See BILL OF EXCEPTIONS, 4 to 7.

SIGN LANGUAGE.

See CRIMINAL LAW, 7 to 10.

SPECIAL FINDING.

See PLEADING, 13; SUPREME COURT, 8, 11; TELEGRAPH COMPANY, 8, 9.

1. *What Necessary to Authorize Judgment Upon Notwithstanding General Verdict.—Burden of Proof.*—Where there is a general verdict against the party having the burden of the issue, he is not entitled to a judgment on the special findings, unless all the facts essential to a recovery by him appear in the answers of the jury and are irreconcilable with the verdict. *Rice v. City of Evansville, 7*
2. *General Verdict.—Judgment Non Obstante.—Evidence.*—Upon a motion for judgment on special findings, notwithstanding the general verdict, the findings, within the issues, import absolute verity, and unless they are irreconcilable with the general verdict, the motion must be overruled, without regard to the evidence. *Porter v. Waltz, 40*

3. *Facts not Found.—New Trial.*—Facts not stated in a special finding are deemed not proved by the party having the burden of proof, and the remedy for a failure to find all the facts embraced in the issues and the evidence, is by motion for a new trial. *Quill v. Gallivan*, 235
4. *Clerical Error.*—A harmless clerical error in the special finding of facts is not available for a reversal of the judgment.
Ward v. Berkshire L. Ins. Co., 301
5. *Must be Complete.—Judgment.*—Where a judgment rests on a special finding of facts, all the material facts essential to support it must appear, as nothing will be supplied by intendment.
Buchanan v. Milligan, 433
6. *Same.—Appeal Bond.—Lost Instrument.—Finding as to Terms and Conditions.*—Where a party is sought to be made liable on an appeal bond which is averred to be lost, its terms and conditions must be so fully stated in the special finding that the nature of the undertaking may be ascertained and the extent of the liability of the obligor be made known as matter of law. *Id.*

STATUTE.

- See AGENCY; BASTARDY; BILL OF EXCEPTIONS, 2 to 6; CITY, 4, 5, 9, 10; COUNTY COMMISSIONERS; CRIMINAL LAW, 2, 3, 13, 23; DECEDENTS' ESTATES, 2; DRAINAGE, 12, 13; INSTRUCTIONS TO JURY, 3; MORTGAGE, 2, 6; PLEADING, 8; RAILROAD, 1, 4, 6; STATUTE OF LIMITATIONS; TAXES, 3 to 9, 14, 15; TELEGRAPH COMPANY, 1 to 3, 5 to 7; WITNESS, 2.
1. *Penal.—Construction.*—Penal statutes must be strictly construed.
Western U. Tel. Co. v. Steele, 163
 2. *Construction.—Rules.—Intention of Legislature.*—In the construction of statutes the prime object is to ascertain and carry out the purpose of the Legislature in their enactment, and to do this the words used must be first considered in their literal and ordinary signification, but the courts may go beyond such meaning of the words, and look to other statutes upon the same subject, to the objects contemplated, the evils to be corrected, and the remedy provided.
City of Evansville v. Summers, 189

STATUTE CONSTRUED.

- See ACTION; BILL OF EXCEPTIONS, 2; PARTITION FENCE, 1; RAILROAD, 1; STATUTE; STATUTE OF LIMITATIONS; TAXES, 4 to 7; TELEGRAPH COMPANY, 1, 7; TOWNSHIP TRUSTEE.

STATUTE OF FRAUDS.

See CONTRACT, 3; SALE, 3.

STATUTE OF LIMITATIONS.

- See ACTION; CRIMINAL LAW, 4; MORTGAGE, 7.
- Contract Made in this State.—Non-Residence of Defendant.—Statute Construed.*—Under section 297, R. S. 1881, if the contract out of which a cause of action arises is made in this State, but the defendant is all the time a non-resident, the statute of limitations does not run.
Wood v. Bissell, 229

STREET.

See CITY, 2, 10 to 14; RAILROAD, 2; TOWN.

SUBROGATION.

See DECEDENTS' ESTATES, 5; MORTGAGE, 3.

SUMMONS.

See CORPORATION; RAILROAD, 4.

SUPREME COURT.

See APPEAL; ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW, 6, 12; DECEDENTS' ESTATES, 2; DEED, 4; GRAVEL ROAD, 8; HIGHWAY, 1, 2; INSTRUCTIONS TO JURY, 1, 2, 5; JUDGMENT, 2; PLEADING, 9, 19; PRACTICE.

1. *Insufficient Complaint.—Subsequent Errors Harmless.—Affirmance of Judgment.*—Where the plaintiff appeals and his complaint is held insufficient, any subsequent error in the record will be deemed harmless and the judgment affirmed. *Palmer v. Logansport, etc., G. R. Co., 137*
2. *Practice.—Bill of Exceptions.—Motion to Dismiss.*—Where motions to dismiss, and to strike out evidence, and the rulings thereon, are not made parts of the record by a bill of exceptions or an order of the court, no question thereon is presented on appeal.
Board, etc., v. Harlem, 164
3. *Complaint Questioned by Assignment of Error.*—A complaint, which is good as against the defendants named, can not be questioned for the first time in the Supreme Court by an assignment of errors made by parties brought into the trial court on application of one of the original defendants.
Quill v. Gallivan, 235
4. *Same.—Judgment.—Practice.*—If all the persons interested in land are before the court, whether parties originally or brought in by cross complaint, the court may settle and adjudicate all conflicting titles and equities; and if those so brought in are not satisfied with the decree, but make no motion to modify, they can not question it for the first time in the Supreme Court.
Ib.
5. *Weight of Evidence.*—The finding of the trial court will not be disturbed, on appeal, upon the weight or sufficiency of conflicting evidence.
Allyn v. Allyn, 327
6. *Same.—Immaterial Issue will be Disregarded.*—It is the duty of the trial court, and of the Supreme Court on appeal, to disregard, as immaterial, an issue joined on a bad paragraph of answer, and render judgment without reference thereto.
Ib.
7. *Weight of Evidence.—Equity Cases.*—The Supreme Court will not disturb the finding of the trial court upon the weight of the evidence, either in law or equity cases.
McConnell v. Huntington, 405
8. *Special Finding.—New Trial.—Mandate on Reversal of Judgment.*—Where a special finding of facts is so complete that nothing remains but to pronounce and apply the law, the mandate on reversal will be that judgment be rendered on the special finding; but where it appears from the whole record that justice can only be done by directing a new trial, that course will be adopted.
Buchanan v. Milligan, 433
9. *Same.—Powers of Courts.*—Courts will exercise such authority as will promote justice and prevent wrong.
Ib.
10. *Verdict.—Excessive Damages.—Practice.*—The Supreme Court will not disturb a verdict as to the amount of damages assessed, on the ground that they are excessive, where it does not appear that the jury must have acted from prejudice, partiality, or other improper motive.
Louisville, etc., R. W. Co. v. Pedigo, 481
11. *Special Finding.—New Trial.—Mandate on Reversal of Judgment.*—Where there is a special finding of facts and conclusions of law, the Supreme Court, on reversing the judgment, will remand the cause for a new trial where justice requires it, instead of for judgment on the facts.
Western U. Tel. Co. v. Brown, 538

12. *Weight of Evidence*.—The Supreme Court will not reverse a judgment upon the weight of conflicting evidence.

Louisville, etc., R. W. Co. v. Jones, 551

SURETY.

- See MARRIED WOMAN, 2 to 6; MORTGAGE, 5; PRINCIPAL AND SURETY.

TAXES.

See EVIDENCE, 3; MORTGAGE, 3.

1. *Sale.—Action by Purchaser to Enforce Lien.—Auditor's Certificate.—Deed.—Evidence.—Personal Property*.—In an action by a purchaser at a tax sale to enforce his lien, the auditor's certificate of the sale and the deed issued are admissible, without first proving that the owner had no personal property. *McKeen v. Haskell, 97*
2. *Same.—Omitted Property.—Illegal Assessment by Auditor.—Copying Void Assessment on Succeeding Duplicate*.—Where an illegal and void special assessment of omitted property, made by the county auditor, is copied by him upon the duplicate of a succeeding year, it is likewise illegal and void for that year. *Id.*
3. *Same.—Interest.—Act of March 5th, 1883*.—Under section 3 of the amendatory tax law of March 5th, 1883 (Acts of 1883, p. 96), the purchaser at a tax sale previously made, whose title proves to be invalid and who seeks to enforce his lien, is entitled to interest on the amount of the lien at the rate of twenty per centum per annum from the date of the sale to the date of the decree, and not to the date of payment. *Id.*
4. *False List.—Complaint to Recover Penalty.—Residence of Taxpayer.—Construction of Statute*.—A complaint to recover the penalty prescribed by section 6339, R. S. 1881, for making a false tax list, to be sufficient must aver that the defendant was a resident of the township, to the assessor of which it is alleged he gave the false list. *Burgh v. State, ex rel., 132*
5. *Same.—Constitutional Law.—The Penalty not a Fine.—Payment into Treasury for Use of County.—Common School Fund*.—The fact that the penalty, when recovered, is to be paid into the county treasury for the use of the county, does not bring the statute into conflict with section 2, of article 8, of the Constitution, which provides that fines shall go into the common school fund, as such penalty is not a fine in the sense of the word as there used. *Id.*
6. *Same.—Excessive Fines and Penalties.—Discretion of Court*.—As the penalty (not less than fifty dollars nor more than five thousand dollars) must be imposed in the sound discretion of the court and in proportion to the gravity of the offence, the statute is not in conflict with section 16 of the Bill of Rights. *Id.*
7. *Same.—Double Punishment*.—As the wrong for which a penalty is recoverable under such statute is different from the wrong for which a punishment may be inflicted under section 2150, it is not in conflict with the provision of the Bill of Rights forbidding double punishment for the same offence. *Id.*
8. *Valuation and Assessment of "Railroad Track".—State Board of Equalization*.—Under the revenue acts of this State, the State board of equalization has exclusive authority to value and assess the railroad property denominated "railroad track" and "rolling stock." Section 6410, R. S. 1881. *Pfuff v. Terre Haute, etc., R. R. Co., 144*
9. *Same.—Right of Way.—Improvements*.—The right of way, with the improvements upon it, is to be valued and assessed as "railroad track." Section 6362, R. S. 1881. *Id.*
10. *Same.—What Term "Right of Way" Includes*.—The term "right of way"

is not limited to a strip of land of any definite width at all points on the line of a railroad, but includes lands and lots acquired for necessary side tracks and turnouts, and the improvements thereon in the way of coal sheds, freight houses, water-tanks, repair shops, round-houses, and the like. *Ib.*

11. *Tax Lists. — Verification.*—Under the law of this State, the list of personal property which the owner is required to make for tax purposes must be sworn to by such owner. *State v. Reynolds, 353*
12. *Same. — Assessor. — Power to Administer Oaths.*—The assessor and his deputies have authority, under the statute, to administer all necessary oaths in connection with tax-lists *Ib.*
13. *Same. — Repeal of Statute.*—The repeal of "all laws within the purview" of the repealing act does not include the provisions of any statute in relation to cases not provided for by such repealing act. *Ib.*
14. *Assessment of Moneys and Credits. — Residence of Owner.*—All residents of a township on the 1st day of April, or at any time between that day and the 1st day of Jun', the time when the assessor is required to complete his assessment, are taxable in that township for their moneys and credits, owned on the 1st day of April, except such as have become residents subsequent to the last named date and have been assessed, and are held for tax, upon such moneys and credits in the taxing district from which they have moved, as provided in section 6298, R. S. 1881. *Ib.*
15. *Same. — Criminal Law. — False Tax-List. — Residence. — Indictment for Perjury. — Negating Exception in Statute.*—An indictment for perjury committed in swearing to a tax-list, falsely stating the amount of moneys and credits owned by him, must show that the defendant was taxable for such property in the township in which the list was made, either by alleging that he was a resident of such township on the 1st day of April, or by negating the exception contained in section 6298, and thus showing that, although he became a resident of the township after the 1st day of April, he had not been assessed upon his moneys and credits in the taxing district from which he had moved. *Ib.*

TELEGRAPH COMPANY.

1. *Transmitting Message. — No Penalty for Mere Neglect. — Statute Construed.*—Under the act of 1885, an action will not lie against a telegraph company to recover a penalty for neglect in transmitting a message, that act providing a penalty only for bad faith, partiality and discrimination. *Western U. Tel. Co. v. Steele, 163*
2. *Refusal to Transmit Message Over Indirect Line When Direct Line is Available. — Penalty.*—A telegraph company is not liable for the penalty provided in section 4176, R. S. 1881, for refusing to receive a message for transmission from one office to the desired destination, over an indirect line necessitating repetition, where it has another office in the same town, and only a short distance from the first, from which the message can be sent directly to its destination, without repetition, and from which it subsequently is sent without delay, and promptly delivered. *Western U. Tel. Co. v. Wilson, 308*
3. *Same. — Repeal.*—The act of 1885, Acts 1885, p. 151, repealed section 4176, R. S. 1881, but such repeal did not release or extinguish any penalty incurred under that section. *Ib.*
4. *Same. — Right to Recover Penalty. — Damages.*—A party can not recover the penalty prescribed by the statute in a case where he can not maintain an action for damages, either nominal or otherwise. *Ib.*
5. *Section 4176, R. S. 1881. — Repeal of by Implication by Act of 1885.*—Section 4176, R. S. 1881, relating to the duty of telegraph companies in the

transmission of messages, and providing penalties, was repealed by implication by the act of April 8th, 1885 (Acts 1885, p. 151), on the same subject.

Western U. Tel. Co. v. Brown, 538

6. *Same.*—*Penalty.*—*Repeal of Act Providing, Does Not Prevent Recovery.*—Under section 248, R. S. 1881, the repeal of a statute providing a penalty does not extinguish a right of action which accrued thereunder, unless the repealing act expressly so provides. The act of 1885 not so providing, section 4176 is to be treated as in force for the purpose of sustaining an action to recover a penalty incurred before its repeal. *Ib.*
7. *Same.*—*Sender of Message.*—*Right of Action.*—*Quære.*—Under section 4176 only the sender of a message could maintain an action for the penalty therein provided. *Quære*, whether the right of action is extended by the act of 1885. *Ib.*
8. *Same.*—*Burden of Proof.*—*Special Finding.*—The burden is upon the plaintiff, in an action for the penalty, to show that he was the sender of the message, and if there is a special finding of facts, the fact that he was the sender must affirmatively appear. *Ib.*
9. *Same.*—A finding that the plaintiff, Alonzo F. Brown, delivered to the telegraph company, and paid for the transmission of, a message signed "L. F. Brown," is not a sufficient finding that the plaintiff was the sender. *Ib.*

TENANCY.

See LANDLORD AND TENANT.

TENDER.

See DEED, 10.

TITLE.

See GUARDIAN AND WARD; JUDGMENT, 2; PLEADING, 10; REPLEVIN, 6, 7.

TORT.

See INFANT, 4; MALICIOUS PROSECUTION; NEGLIGENCE; NEW TRIAL, 6, 7; RAILROAD, 8.

TOWN.

See CITY.

Grade of Street.—*Invalid Order Fixing.*—*Emergency Clause.*—*Notice of Adoption.*—*Liability of Contractor for Street Improvement to Lot-Owner for Injury.*—Where an order establishing the grade of a street in a town is passed by the board of trustees without an emergency clause, and no notice of its adoption is given, a lot-owner whose property is injured by the improvement of the street, may maintain an action against the contractor for the damage. *Meyer v. Fromm, 208*

TOWNSHIP TRUSTEE.

See POOR.

1. *Overseer of Poor.*—*Limit of Compensation.*—*Statute Construed.*—Under section 32 of the act of March 31st, 1879 (section 6009, R. S. 1881), a township trustee is entitled to two dollars per day, payable out of the township fund, for services rendered in the ordinary business of the township, and to the same rate of compensation, payable out of the county treasury, for services as overseer of the poor; but he is not entitled to receive two dollars from each source for the same day's services, that amount being the limit of his compensation from either or both, according as the services are performed. *Board, etc., v. Bromley, 158*
2. *Same.*—*Intermingled Services.*—*Action Against County for Services as Over-*

seer.—Reimbursement of Township for Overcharges.—Where a township trustee during his term intermingles his services for the township and as overseer of the poor, and receives full compensation from the township fund for every day when he performed any official duty, he can not recover compensation from the county for services as overseer, on the ground that he is liable to reimburse the township fund for the amount overcharged for other official services. *1b.*

TRIAL.

See CRIMINAL LAW, 25, 26; DEMURRER TO EVIDENCE, 2.

Jurisdiction.—Waiver.—Where there is no request by either party at any time for a jury, and the court orders a trial partly by a jury and partly by the court, it is too late, after a verdict and finding, to object for the first time to the trial as had. *Sprague v. Pritchard, 491.*

TRUST AND TRUSTEE.

See ATTORNEY AND CLIENT; BANKS AND BANKING.

Breach of Trust.—Evidence.—Weight of.—Attorney and Client.—Agency.—Damages.—Real Estate.—Conveyance.—Action for breach of trust and consequent damages, it being alleged in the complaint that the plaintiff had employed the defendant, an attorney, to purchase and get possession of a tract of land for him, and that he had acquired title and possession, but refused to convey to the plaintiff, and had conveyed to another person. The only question arises upon the evidence, and as it is conflicting the finding of the trial court will not be disturbed.

Contee v. Wright, 456

TURNPIKE.

See GRAVEL ROAD; INJUNCTION.

USAGE.

See LANDLORD AND TENANT, 4.

VARIANCE.

See REPLEVIN, 1.

VENDOR AND PURCHASER.

See DECEDENTS' ESTATES, 3 to 5; DEED; EVIDENCE, 1; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; MORTGAGE, 5, 9; SALE; SHERIFF'S SALE.

1. *Conveyance.—Mistake.—Equitable Title.—Judgment.—Sheriff's Sale.—Husband and Wife.*—Where a purchaser pays full consideration for, and goes into possession of, a tract of two hundred acres of land, but by mistake the deed to him describes sixty acres only, a subsequent conveyance to his wife, at his request, upon discovering the mistake, of the remaining one hundred and forty acres, vests in her, and a conveyance from her will vest in her grantee, a complete title, free from intervening judgments recovered against the grantor, and all claims of title thereunder, as such judgments could not become effectual liens as against the actual owner of the land. *Wells v. Benton, 586*
2. *Same.—Agreement of Grantee to Pay Judgments which are Not Liens.—Consideration.—Covenant Running with Land.*—A stipulation in the deed to the wife that, as a consideration for the conveyance, she is to pay certain judgments recovered against the grantor after the sale to her husband, is without consideration, and does not have the effect to enlarge or extend the lien of the judgments, nor is it a covenant running with the land which can bind it in the hands of her grantee. *Ib.*
3. *Assumption of Debt.—Agreement to Pay Encumbrance.—Enforcement by Creditor.—Equity.*—Where a purchaser assumes the payment of a debt owing by his vendor to a third person, or expressly agrees to pay an

encumbrance on the land, out of the purchase-money, such agreement enures to the benefit of the creditor, and may be enforced in equity.

Ayres v. Randall, 595

4. *Same.—Mortgage.*—An agreement between the vendor and purchaser of real estate, in which it is recited that there is a mortgage on the property which the former claims is paid, and which he agrees to have satisfied of record within one year, failing in which the grantee may pay the same out of purchase-money still owing by him, is not such an assumption of the mortgage debt, or such an agreement, to pay it, as entitles the mortgagee to maintain an action thereon. *Id.*

VERDICT.

See BILL OF EXCEPTIONS, 9; HIGHWAY, 1; NEW TRIAL, 7; SPECIAL FINDING, 1, 2; SUPREME COURT, 10.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

VOLUNTARY PAYMENT.

See MORTGAGE, 3.

WAIVER.

See GRAVEL ROAD, 3; INSURANCE, 1 to 3; PLEADING, 3, 16; SHERIFF'S SALE, 4; TRIAL.

WATERCOURSE.

See CITY, 3, 11, 12.

WAYS.

See CITY, 2, 10 to 14; GRAVEL ROAD; HIGHWAY; INJUNCTION; RAILROAD, 2; TOWN.

WIDOW.

See GUARDIAN AND WARD; WILL, 3 to 5, 13.

WILL.

See DECEDENTS' ESTATES, 3, 4; EVIDENCE, 7; EXECUTION; LANDLORD AND TENANT, 1 to 3, 6.

1. *Construction.—Independent Clauses.*—Where the two clauses of a will create an estate in the several devisees named, and they are not united grammatically or by the expression of a common purpose, each clause must be considered and construed separately, and without relation to the other, even though the testator may have had the same intention in regard to both. *Bailey v. Sanger, 264*
2. *Same.—When Subsequent Clauses will not Control.*—Where an interest or estate is given in one clause of a will in clear and decisive terms, it can not be taken away or cut down by raising a doubt upon the meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words giving the interest or estate. *Id.*
3. *Same.—Life-Estate in Widow, with Remainder Over.—Property not Derived Follows Law of Descent.*—Where, by the first clause of a will, the testator devised one undivided third of certain real estate to his wife during her life, with remainder over to their only child, a daughter, but making no devise over or other limitation upon the estate, the widow, on the death of the daughter, unmarried and childless, inherited the same by descent as sole heir. *Id.*
4. *Same.—When Widow not Entitled to Life-Estate.*—Where, in such case, by a second clause of his will, the testator devised the remaining two-thirds of his real estate to his daughter, and in the event of her death

before, with no children living at, the death of his wife, "then the share of said property, above devised to my said daughter, is hereby devised and bequeathed to my father," etc., the widow, on the happening of the contingency, is not entitled to a life-estate in such two-thirds. *Ib.*

5. *Same.—Possession of Devisees.*—The rule, that where a devise to one who stands in the relation of heir to the testator is to take effect in possession only upon the death of the testator's wife, the latter takes a life-estate by implication of law, has no application where, by the terms of the will, the devisees are entitled to possession immediately upon the death of the testator. *Ib.*
6. *Determinable Fee.—Husband and Wife.—Execution and Sale.*—Where, by the will of her father, a daughter is given land in fee simple, subject only to the contingency that she shall die without issue, or that her surviving issue shall die before arriving at full age, the estate taken is a determinable fee, and upon her death her husband succeeds to an undivided one-third in fee, subject only to the same contingency, and such third is subject to sale on judgments rendered against him. *Greer v. Wilson, 322*
7. *Rule in Shelley's Case.*—Where a life-estate is created in a devisee named, and the same will devises the remainder to devisees, who are named, and their lawful heirs, such devisees take an estate in fee. *Hochstetler v. Hochstetler, 506*
8. *Same.—When "Heirs" Construed to Mean "Children."*—It is only where the words of the will clearly show that the word "heirs" was used as meaning "children," that the courts will assign it that meaning. *Ib.*
9. *Same.—When Clear Devise Affected by Subsequent Words.*—Where one clause of a will gives an estate in clear and decisive terms, such estate can not be taken away or cut down by any subsequent words that are not as clear and decisive as those giving it. *Ib.*
10. *Same.—Executor.*—An executor can only take land to the exclusion of the heir or devisee when it is needed for the payment of the testator's debts. *Ib.*
11. *Description of Land.—Mistake.*—A will contained this provision: "As to my real estate, I dispose of it as follows: I own the east half of the northwest quarter," etc., "and I hereby give and bequeath the same to my son," etc. The testator did not own the east half of the north-west quarter, but did own the west half. *Held*, that as the will itself shows a mistake, it will be made to operate upon the land intended to be devised. *Pocock v. Redinger, 573*
12. *Same.—Evidence.—Declarations of Testator.*—Verbal declarations of a testator are not competent evidence to show a mistake in a will, but facts and circumstances are. *Ib.*
13. *Devise of Life-Estate.—Intestacy as to Fee.*—Where a testator devises his lands to his widow for life, but fails to dispose of the fee, the law casts it upon his heirs. *Thomas v. Thomas, 576*
14. *Same.—Descent.—Exclusion of Heir.—Estoppel.*—A subsequent clause of the will, bequeathing to a named son "twenty-five dollars only" of all the testator's real and personal property, is not of itself sufficient to exclude him from participation under the statute of descents, nor is he estopped to assert his right as heir by receiving the legacy. *Ib.*

WITNESS.

See CRIMINAL LAW, 7 to 10, 20; NEGLIGENCE, 7.

1. *Evidence.—Examination of Witness.—Leading Questions.—Discretion of*

Court.—Where there is no abuse of its discretion by the trial court, in permitting leading questions, there can be no reversal on such ground.

Kyle v. Miller, 90

2. *Mileage.*—*Attendance in Two Causes at Same Time.*—*Constructive Fees.*—*Act of February 28th, 1883.*—Where two actions, brought by different parties, are pending against the same defendant, witnesses who are summoned by both plaintiffs and who attend in both causes on the same day, although they travel the distance to and from the place of trial but once, are entitled to mileage fees in each cause. The act of February 28th, 1883 (Acts of 1883, p. 48), in relation to constructive fees, does not apply to the fees and mileage of witnesses.

Vernon, etc., R. R. Co. v. Johnson, 126

3. *Decedents' Estates.*—*Parties.*—Where the action is against an administrator to recover money from the decedent's estate, parties to the record are not competent witnesses as to matters which occurred prior to the death of the decedent.

McConnell v. Huntington, 405

WORDS AND PHRASES.

See ACCOUNT, 1; CRIMINAL LAW, 13; INSANITY, 2; LANDLORD AND TENANT, 3, 5; TAXES, 8 to 10.

WRITTEN INSTRUMENT.

See BILL OF EXCEPTIONS, 5; PLEADING, 9.

END OF VOLUME 108.

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